

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/1. INTRODUCTION/1. In general.

## **MISTAKE (VOLUME 77 (2010) 5TH EDITION)**

### **1. INTRODUCTION**

#### **1. In general.**

Mistake has long been considered to have an important impact on moral responsibility<sup>1</sup>. It is also important in relation to questions of legal responsibility. This title deals with the consequences of mistake (whether of fact or law) as a ground for relief, or the basis of a defence, between the parties to civil proceedings. The effect of misrepresentation resulting in a mistake of one or more of the parties to civil litigation is principally dealt with elsewhere in this work<sup>2</sup>, as are the effect of a mistake on criminal liability<sup>3</sup>, and the effect of mistake on marriage<sup>4</sup>.

1 See eg Aristotle *Nicomachean Ethics* Bk 5, viii.

2 As to the distinction between misrepresentation and mistake see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 703 et seq.

3 See **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 17.

4 See **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARAS 44, 430.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/1. INTRODUCTION/2. Relevance of law and equity.

#### **2. Relevance of law and equity.**

The effect of mistake differed originally as between common law and equity<sup>1</sup>. The difference is still of more than historical importance, despite fusion of the two systems<sup>2</sup>. The legal rules still apply to claims for the recovery of money paid under a mistake<sup>3</sup>, or of property purportedly transferred under a mistake<sup>4</sup>, and to cases where a party to a claim on a contract or specialty<sup>5</sup> is entitled to the plea non est factum<sup>6</sup>, or where the case of one of the parties to a claim founded on contract is that there was no contract between them<sup>7</sup>. On the other hand the rule that, in case of conflict, the rules of equity prevail<sup>8</sup> ensures that, where the remedy sought is equitable in origin, as when a claimant claims rectification<sup>9</sup>, the return of money<sup>10</sup> or property<sup>11</sup>, or where the rights of innocent third persons are involved<sup>12</sup>, the wider rules of the old equitable jurisdiction are applicable.

1 See **EQUITY** vol 16(2) (Reissue) PARA 439.

2 See **EQUITY** vol 16(2) (Reissue) PARA 401 et seq; and PARAS 3-4.

3 See PARAS 69-76.

- 4 See PARA 79.
- 5 le a contract made by deed: see **CONTRACT** vol 9(1) (Reissue) PARAS 616-617.
- 6 See PARA 12.
- 7 See PARAS 13, 16-18.
- 8 See the Senior Courts Act 1981 s 49(1); and **EQUITY** vol 16(2) (Reissue) PARA 500. The Senior Courts Act 1981 was previously known as the Supreme Court Act 1981 and was renamed by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 as from 1 October 2009: see the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604; and **COURTS**.
- 9 See PARAS 57-68.
- 10 See PARA 77.
- 11 See PARA 80.
- 12 See PARA 42.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/2. LEGAL CONSEQUENCES AND CLASSIFICATION OF MISTAKE/(1) THE LEGAL CONSEQUENCES OF MISTAKE/3. Mistake as a ground for relief: common law.

## **2. LEGAL CONSEQUENCES AND CLASSIFICATION OF MISTAKE**

### **(1) THE LEGAL CONSEQUENCES OF MISTAKE**

#### **3. Mistake as a ground for relief: common law.**

At common law<sup>1</sup> mistake founds relief in four cases only, namely:

- 1 (1) in claims to recover money paid under a mistake<sup>2</sup>;
- 2 (2) in claims to recover property which was prevented from passing by reason of a mistake<sup>3</sup>;
- 3 (3) in claims to recover damages in respect of a mistake induced by fraudulent<sup>4</sup> or non-fraudulent misrepresentation<sup>5</sup>;
- 4 (4) as a defence in claims of contract where a mistake of fact was of such a nature as to preclude the formation of any contract in law<sup>6</sup>.

It must not be assumed that the kind of mistake that would justify one of these claims is the same as would justify the others. So cases where the claimant succeeds in restitution for mistake do not establish that a contract would be avoided for mistake<sup>7</sup>, and mistakes grounding restitutionary remedies are much wider than those which vitiate the intention to pass property<sup>8</sup>.

- 1 As to the consequences of mistake at common law see PARA 7. As to mistake in equity see PARAS 4, 8
- 2 See PARA 69 et seq.
- 3 See PARA 79.
- 4 As to fraudulent misrepresentations see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 755-761. As to the remedies available in respect of fraudulent misrepresentation see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 781.

5 As to non-fraudulent misrepresentations see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 762-764. As to the remedies available in respect of non-fraudulent misrepresentation, including the statutory right to damages provided by the Misrepresentation Act 1967, see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARAS 782, 801.

6 See PARAS 13-15, 16-18; and **CONTRACT** vol 9(1) (Reissue) PARA 607.

7 *Citibank NA v Brown Shipley & Co Ltd, Midland Bank plc v Brown Shipley & Co Ltd* [1991] 2 All ER 690 at 700, [1991] 1 Lloyd's Rep 576 at 584 per Waller J; cf *Norwich Union Fire Insurance Society Ltd v WH Price Ltd* [1934] AC 455, PC; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 4 All ER 1072, [2004] 1 WLR 1784, at [58] per Potter LJ.

8 *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677 at 689, [1979] 3 All ER 522 at 530 per Goff J.

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#### 4. Mistake as a ground for relief: equity.

In equity mistake is said to relieve in a much wider range of cases than at common law<sup>1</sup>. This includes:

- 5 (1) rectification of documents which do not accurately record the transaction concerned<sup>2</sup>;
- 6 (2) a defence to some suits for specific performance of contracts<sup>3</sup>;
- 7 (3) proceedings to recover (or regularise) money paid and other assets transferred by mistake<sup>4</sup>;
- 8 (4) the so-called doctrine of proprietary estoppel<sup>5</sup>.

Formerly, it also included rescission of certain contracts or other transactions entered into where the common law would give no relief<sup>6</sup>.

Moreover, equity often imposes a duty on a party in certain cases to speak out, and hence silence may constitute a representation justifying relief for the mistaken party<sup>7</sup>.

The distinction between mistake at common law and in equity is also important because of its effect on the rights of third parties. Mistake may mean that at law property may not pass, and hence third parties cannot acquire title to it<sup>8</sup>. However, in equity the transaction may be voidable, so that property may pass<sup>9</sup>, and third party rights may be acquired<sup>10</sup>.

1 Meagher, Gummow and Lehane *Equity--Doctrines and Remedies* (4th Edn, 2002) chs 14, 20, 26; and **EQUITY** vol 16(2) (Reissue) PARA 408. As to the consequences of mistake in equity see PARA 8. As to mistake at common law see PARA 3.

2 See PARAS 57-68.

3 See PARA 51.

4 See PARAS 69-80.

5 See PARA 33.

6 See PARAS 52-56.

7 See PARA 28.

8 See PARAS 26-27.

9 See PARA 27.

10 See PARA 42.

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## 5. Mistake as a ground for relief: other cases.

Mistake may be made a ground for relief by statute, for example, in relation to the assessment of a solicitor's costs<sup>1</sup>, or in income tax matters<sup>2</sup>; however, an agreement between the Inland Revenue and a taxpayer is subject to the ordinary law of rectification of contracts<sup>3</sup>.

Mistake may also be a ground for relief where it occurs in the legal process itself, as when an appearance is entered in a claim by mistake<sup>4</sup>, or money is paid into court by mistake<sup>5</sup>, or is so paid on a mistaken view of the statement of claim<sup>6</sup>, or is paid out by mistake<sup>7</sup>: however, whether it is a ground for relief in an agreement to compromise litigation depends on the principles applicable to ordinary contracts, taking into account elements of public policy<sup>8</sup>.

By statutory intervention, mistake is now a ground for relief in certain cases concerning wills<sup>9</sup>, where rectification for mistake was not previously possible<sup>10</sup>.

Special rules relate to mistakes made in entering into contracts *uberrimae fidei*, that is, of the utmost good faith, such as contracts of insurance<sup>11</sup>, contracts of salvage<sup>12</sup>, and perhaps family compromises<sup>13</sup>.

1 See the Solicitors Act 1974 s 57(5); *Rutter v Sheridan-Young* [1958] 2 All ER 13, [1958] 1 WLR 444, CA; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 943.

2 See **INCOME TAXATION** vol 23(1) (Reissue) PARA 515; **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1733-1736.

3 See *R v Inspector of Taxes, ex p Bass Holdings Ltd, Richart (Inspector of Taxes) v Bass Holdings Ltd* [1993] STC 122, (1992) 65 TC 495; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1767.

4 *Firth v John Mowlem & Co Ltd* [1978] 3 All ER 331, [1978] 1 WLR 1184, CA.

5 *Spurr v Hall* (1877) 2 QBD 615 at 624 per Field J.

6 *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618, [1948] 1 All ER 264, CA. See also **EQUITY** vol 16(2) (Reissue) PARA 1010.

7 See *Slater v Slater* [1897] 1 Ch 222n; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 754. See also *Gainsborough Mixed Concrete Ltd v Duplex Petrol Installations Ltd* [1968] 3 All ER 267 at 268, [1968] 1 WLR 1463 at 1465-1466, CA, per Lord Denning MR.

8 See *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321; and PARA 25.

9 See the Administration of Justice Act 1982 s 20; and PARA 64.

10 Cf *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037, [1976] 1 WLR 161.

11 See **INSURANCE** vol 25 (2003 Reissue) PARAS 92, 267, 394, 397.

12 See **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 969.

13 See PARA 25; and **SETTLEMENTS** vol 42 (Reissue) PARA 1002 et seq.

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## 6. Classification of mistakes.

Mistakes may arise from ignorance, misconception, or forgetfulness. Generally speaking, in considering the consequences of mistake, no distinction is drawn by the law between these different sources<sup>1</sup>.

Mistakes may be divided into:

- 9 (1) those which prevent there being an effective consent to a particular transaction<sup>2</sup>; and
- 10 (2) those which consist in a failure to express correctly in a written document the intention of the parties with regard to a particular transaction<sup>3</sup>.

Mistakes within head (1) above may be further subdivided according to whether they are mistakes as to law, or mistakes as to fact<sup>4</sup>. Mistakes as to private rights historically were classed rather among instances of error in fact than among instances of error in law<sup>5</sup>, even where there are no circumstances of circumvention or fraud<sup>6</sup>. This distinction is now less important<sup>7</sup>.

Mistakes of fact may be divided into:

- 11 (a) mistakes as to the nature of the transaction<sup>8</sup>;
- 12 (b) mistakes as to the identity of the other party to the transaction<sup>9</sup>; and
- 13 (c) mistakes as to the subject matter or other terms of the transaction, which may be either as to the identity of, or as to some fact materially connected with, the subject matter of the transaction, or as to the terms of the transaction<sup>10</sup>.

1 See PARA 40.

2 See PARAS 12-18.

3 See PARAS 35-37.

4 As to mistakes of law see PARAS 9-11. As to mistakes of fact see PARA 12 et seq.

5 *Denys v Shuckburgh* (1840) 4 Y & C Ex 42; and see PARA 10.

6 *Clifton v Cockburn* (1834) 3 My & K 76 at 99 per Lord Brougham LC.

7 See PARA 9.

8 See PARA 12.

9 See PARAS 13-15.

10 See PARAS 16-18.

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## 7. Consequences of mistake: common law.

At common law a mistake, if it operates at all, will generally negative consent<sup>1</sup>. However, it will not so operate where the mistake was not material (that is, the mistaken party would still have consented if he had known the true position)<sup>2</sup>. Thus where A intends to sell one thing, and B to buy another, there is no contract, even though A and B mistakenly think (or A alone thinks) that they are referring to the same thing<sup>3</sup>. Similarly if the mistake is over terms rather than subject matter<sup>4</sup>. So too if A intends to contract with B alone, and mistakenly deals with C, there is no contract<sup>5</sup>. The principle is not confined to contract. If A intends to give property in goods to B alone, but mistakenly delivers them to C, normally property does not pass<sup>6</sup>. But all these cases are subject to the doctrine of estoppel, which may operate so as to prevent a mistaken party from denying the existence of that consent which is necessary for the validity of the transaction concerned<sup>7</sup>.

Mistakes which do not negative consent are sometimes said to 'nullify' consent in certain circumstances, and hence to render a contract void<sup>8</sup>. The precise meaning of this is unclear. Probably all it means is that such mistakes may be taken into account as part of the construction of the transaction, that is, in the contractual allocation of risk<sup>9</sup>. Thus where A sells to B something which, unknown to either, never existed<sup>10</sup>, or has already ceased to exist<sup>11</sup>, there is a valid contract, but either or both parties (depending on construction) may be not liable to perform in the circumstances. Only if, on the true construction of the agreement, neither party is bound (so that the contract is deprived of all practical content) does it approach accuracy to describe the contract as 'void'. The question is instead simply who (if anyone) is to take the risk<sup>12</sup>. Another way of putting the same point is to imply a condition precedent to the obligation to perform<sup>13</sup>. The same reasoning can in principle apply to a mistaken sale or letting to a person of his own property<sup>14</sup>. If a party pays (or otherwise performs) when he need not have done so, there will be restitutionary consequences<sup>15</sup>. Whether there is a category of case, going beyond the construction of the contract and the allocation of risk, where common mistake simply avoids the contract without more, is a difficult question: in principle it is doubtful, but there is some support for this view<sup>16</sup>, although there are few reported examples<sup>17</sup>.

1 *Norwich Union Fire Insurance Society v WH Price Ltd* [1934] AC 455 at 463, PC; *Whittaker v Campbell* [1984] QB 318 at 326-327, [1983] 3 All ER 582 at 585-586 per Robert Goff LJ; cf *Bell v Lever Bros Ltd* [1932] AC 161 at 217, HL, per Lord Atkin.

2 *Mackie v European Assurance Society* (1869) 21 LT 102; *Smith v Wheatcroft* (1878) 9 ChD 223; *Dennant v Skinner* [1948] 2 KB 164, [1948] 2 All ER 29.

3 See PARA 18.

4 See PARA 18.

5 See PARAS 13-15.

6 See PARA 26.

7 See PARA 28.

8 *Bell v Lever Bros Ltd* [1932] AC 161 at 217, HL, per Lord Atkin; and **CONTRACT** vol 9(1) (Reissue) PARAS 888, 894.

9 *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA; *Couturier v Hastie* (1856) 5 HL Cas 673 at 681 per Lord Cranworth LC; *Clark v Lindsay* (1903) 88 LT 198 at 202 per Channell J; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 951-952, [1994] 1 WLR 1016 at 1034-1035, CA, per Hoffmann LJ; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, *The Great Peace* [2002] EWCA Civ

1407 at [77]-[82], [2003] QB 679 at [77]-[82], [2002] 4 All ER 689 at [77]-[82] per Lord Phillips of Worth Matravers MR; and see PARAS 19-23.

10 *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, Aust HC; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255.

11 *Couturier v Hastie* (1856) 5 HL Cas 673; *Strickland v Turner* (1852) 7 Exch 208; *Clark v Lindsay* (1903) 88 LT 198; *Solle v Butcher* [1950] 1 KB 671 at 691, [1949] 2 All ER 1107 at 1119, CA; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 at 460, [1953] 2 All ER 739 at 746-747, CA, per Denning LJ.

12 See PARAS 21-23.

13 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; *Apvodedo Nv v Collins* [2008] EWHC 775 (Ch), [2008] All ER (D) 246 (Apr); *Graves v Graves* [2007] EWCA Civ 660, [2007] 3 FCR 26, [2008] HLR 143, [2007] All ER (D) 32 (Jul); *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch), [2009] BPIR 1315, [2009] All ER (D) 171 (Aug) (revsd in part sub nom *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd, Butters v BBC Worldwide Ltd* [2009] EWCA Civ 1160, (2009) Times, 16 November, [2009] All ER (D) 87 (Nov)).

14 See PARA 33.

15 See PARAS 30-33.

16 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407 at [84]-[94], [2003] QB 679 at [84]-[94], [2002] 4 All ER 689 at [84]-[94] per Lord Phillips of Worth Matravers MR.

17 *Scott v Coulson* [1903] 2 Ch 249 may be one such: see PARA 20.

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## 8. Consequences of mistake: equity.

In equity the position was, until recently, confused. If consent is negated through mistake, and the transaction void at law, equity will not make it valid<sup>1</sup>. Moreover, a transaction which is valid at law will be voidable in equity only where the mistake of one party is accompanied by fraud or taking by surprise by the other<sup>2</sup>. There was a line of authorities which held that mutual mistake of both parties affecting the essence of the contract would also render voidable in equity a transaction which was valid at law<sup>3</sup>. This view has, however, been disapproved by the Court of Appeal on the grounds that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of common law<sup>4</sup>.

There remain, however, circumstances where the conditions for a transaction to be void are satisfied in equity, but not at law. Suppose A purports to let property to B which (unknown to both) A holds on trust for B. The letting is valid at law. However, if B had been legal (rather than equitable) owner, it would (probably) have been void at law<sup>5</sup>. Equity follows the law and the letting is voidable<sup>6</sup>. A similar result follows where A contracts to buy B's equitable interest in a trust fund on the footing that B's interest is joint with C's, and subject to survivorship. In fact C is dead, and B owns the whole. The contract will not be enforced in equity<sup>7</sup>. Additional consequences in equity relate to the availability of specific performance in a claim on the contract<sup>8</sup>, and (more controversially) to the question whether property transferred under a mistake can be said to pass at all<sup>9</sup>.

<sup>1</sup> See *Solle v Butcher* [1950] 1 KB 671 at 694, [1949] 2 All ER 1107 at 1120, CA; and **CONTRACT** vol 9(1) (Reissue) PARA 896.

2 See *Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 233 per Lord Chelmsford. This appears to be an equitable form of estoppel: see PARAS 28, 57.

3 See eg *Solle v Butcher* [1950] 1 KB 671 at 692-693, [1949] 2 All ER 1107 at 1119-1120, CA, per Denning LJ; *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891 at 893, CA, per Lord Denning MR; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 912, [1989] 1 WLR 255 at 267-268 per Steyn J; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 959, [1994] 1 WLR 1016 at 1042, CA, per Evans LJ.

4 See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, *The Great Peace* [2002] EWCA Civ 1407 at [153]-[160], [2003] QB 679 at [153]-[160], [2002] 4 All ER 689 at [153]-[160] per Lord Phillips of Worth Matravers MR (disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA); and see further PARA 53.

5 See PARA 23.

6 *Cooper v Phibbs* (1867) LR 2 HL 149; Matthews 'A Note on *Cooper v Phibbs*' (1989) 105 LQR 599; and see **CONTRACT** vol 9(1) (Reissue) PARA 896; **EQUITY** vol 16(2) (Reissue) PARA 441.

7 *Colyer v Clay* (1843) 7 Beav 188.

8 See PARA 51.

9 See PARAS 26-27.

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## (2) MISTAKE OF LAW

### 9. Relief previously not generally available.

Originally, and as a general rule, relief would not be granted at common law on the ground of mistake, if the mistake was one of law as distinguished from one of fact<sup>1</sup>. The distinction between mistakes of law and mistakes of fact was never clearly defined by the courts<sup>2</sup>, but the mistake of law had to be one of the general law for relief not to be granted<sup>3</sup>, for example, the legal interpretation of a contract<sup>4</sup> or the construction of a statute<sup>5</sup>.

The law is now different, at least in the context of claims to recover mistaken payments<sup>6</sup>, and perhaps other contexts as well. However, as the change is so fundamental, and its precise scope still uncertain (although clearer than it was), some reference to the original position is appropriate.

In equity, the strict common law rule has never applied<sup>7</sup>.

1 *Lowry v Bourdieu* (1780) 2 Doug KB 468; *Bilbie v Lumley* (1802) 2 East 469; *Stockley v Stockley* (1812) 1 Ves & B 23 at 30; *Cockerell v Cholmeley* (1830) 1 Russ & M 418 (affd (1832) 8 Bli NS 120); *Marshall v Collett* (1835) 1 Y & C Ex 232; *Directors etc of Midland Great Western Rly of Ireland v Johnson* (1858) 6 HL Cas 798 at 810; *Morley v Clavering* (1860) 29 Beav 84 at 87 per Sir John Romilly MR; *Eaglesfield v Marquis of Londonderry* (1876) 4 ChD 693 at 709, CA, per James LJ; *British Homophone Ltd v Kunz and Crystallite Gramophone Record Manufacturing Co Ltd* (1935) 152 LT 589; *André et Cie v Ets Michel Blanc et Fils* [1979] 2 Lloyd's Rep 427, CA; *Gee v News Group Newspapers Ltd* (1990) Times, 8 June.

2 *Daniell v Sinclair* (1881) 6 App Cas 181 at 190-191, PC; *André et Cie v Ets Michel Blanc et Fils* [1979] 2 Lloyd's Rep 427 at 430, CA, per Lord Denning MR; and see *Clifton v Cockburn* (1834) 3 My & K 76 at 99 per Lord Brougham LC; Winfield 'Mistake of Law' (1943) 59 LQR 327; Wilson 'A Note on Fact and Law' (1963) 26 MLR 609; Mureinik 'The Application of Rules: Law or Fact?' (1982) 98 LQR 587.



3 *Cooper v Phibbs* (1867) LR 2 HL 149 at 170 per Lord Westbury; *Jackson v Stopford* [1923] 2 IR 1, CA; *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 323-324, [1960] 1 WLR 549 at 560 per Buckley J (affd [1961] Ch 105, [1961] 1 All ER 90, CA); *ITC Pension Fund Ltd v Pinto* (1975) 237 Estates Gazette 725; *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA; *Re Freeston's Charity* [1979] 1 All ER 51, [1978] 1 WLR 741, CA.

4 *Directors etc of Midland Great Western Rly of Ireland v Johnson* (1858) 6 HL Cas 798 at 811 per Lord Chelmsford LC; *Powell v Smith* (1872) LR 14 Eq 85; *Hart v Hart* (1881) 18 ChD 670; *Stewart v Kennedy (No 2)* (1890) 15 App Cas 108, HL; *Wilding v Sanderson* [1897] 2 Ch 534, CA; cf *Re Butlin's Settlement Trusts*, *Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483; *Re Slocock's Will Trusts* [1979] 1 All ER 358.

5 *National Pari-Mutuel Association Ltd v R* (1930) 47 TLR 110, CA. See also *Re Hatch*, *Hatch v Hatch* [1919] 1 Ch 351; *Ord v Ord* [1923] 2 KB 432 at 445-446 per Lush J; *Friends' Provident Life Office v Hiller Parker May & Rowden* [1997] QB 85, [1995] 4 All ER 260, CA.

6 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249; and PARAS 11, 71.

7 See PARA 77.

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## 10. Circumstances in which relief might be granted.

For the purposes of the strict common law rule, there was no mistake of general law where there was ignorance of a private right, even though the private right was the result of a matter of law<sup>1</sup>, or depended on rules of law applied to the construction of legal documents<sup>2</sup>. Nor was there any mistake of general law where there was ignorance of a right which depended on questions of mixed law and fact, and a statement of fact which involved a conclusion of law is still a statement of fact and not a statement of law<sup>3</sup>. Mistake as to the law of a foreign country was held to be a mistake of fact<sup>4</sup>.

However, even where the mistake was held to be in a matter of law, the court might grant relief, if there were circumstances which made it inequitable on the facts of the particular case that the act should stand<sup>5</sup>. But relief would not be granted where a party, having been made aware of the question of law on which his title depended, under circumstances which might have given him equitable right to relief, determined to waive it<sup>6</sup>.

There are authorities that a representation of law can found an estoppel by representation<sup>7</sup>, and authorities that it cannot<sup>8</sup>. The cases are not completely consistent, but the distinction in broad terms appears to be between representations as to private rights or construction, and representations as to general law<sup>9</sup>.

1 *Cooper v Phibbs* (1867) LR 2 HL 149 at 170 per Lord Westbury; *Earl Beauchamp v Winn* (1873) LR 6 HL 223; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA; *Anglo-Scottish Beet Sugar Corp'n Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA. See also *Clifton v Cockburn* (1834) 3 My & K 76; *Denys v Shuckburgh* (1840) 4 Y & C Ex 42.

2 *Earl Beauchamp v Winn* (1873) LR 6 HL 223; *Daniell v Sinclair* (1881) 6 App Cas 181 at 191 per Sir Robert P Collier; *Re Jones' Estate* [1914] 1 IR 188 at 193.

3 *Eaglesfield v Marquis of Londonderry* (1875) 4 ChD 693 at 702, CA, per Jessel MR.

4 *Leslie v Baillie* (1843) 2 Y & C Ch Cas 91; *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289, HL; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424 at 430, [1969] 1 All ER 289 at 290 per Megarry J (affd [1969] 2 Ch 424, [1969] 1 All ER 943, CA); *André et Cie v Et Michel Blanc et Fils* [1979] 2 Lloyd's Rep 427, CA; *The Amazonia* [1990] 1 Lloyd's Rep 236, CA; and see also *Shamil Bank of Bahrain EC v Beximco*

*Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 4 All ER 1072, [2004] 1 WLR 1784, at [58]-[60] per Potter LJ (Sharia'a law).

5 *Clifton v Cockburn* (1834) 3 My & K 76 at 99 per Lord Brougham LC; *Watson v Marston* (1853) 4 De GM & G 230 at 236 per Knight Bruce LJ. See also *Stone v Godfrey* (1854) 5 De GM & G 76 at 90 per Turner LJ; *Re Saxon Life Assurance Society* (1862) 2 John & H 408 at 412 per Page Wood V-C (affd 1 De GJ & Sm 29); *Allcard v Walker* [1896] 2 Ch 369 at 381 per Stirling J; *Re Jones' Estate* [1914] 1 IR 188; *Burroughes v Abbott* [1922] 1 Ch 86 at 95 per Lawrence J; *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67, [1936] 3 All ER 193; *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC; *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483; *Re Slocock's Will Trusts* [1979] 1 All ER 358; and see **EQUITY** vol 16(2) (Reissue) PARA 439.

6 See *Stone v Godfrey* (1854) 5 De GM & G 76 at 90 per Turner LJ; *Rogers v Ingham* (1876) 3 ChD 351, CA.

7 *Sarat Chunder Dey v Gopal Chunder Lala* (1892) LR 19 Ind App 203; *Gresham Life Assurance Society v Crowther* [1914] 2 Ch 219, PC; *American Surety Co v Calgary Milling Co* (1919) 48 DLR 295 at 300, PC; *De Tchiatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Re Eaves, Eaves v Eaves* [1940] Ch 109, [1939] 4 All ER 260, CA; *Singh v Jamal Pirbhai* [1951] AC 688 at 699, PC; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR (on appeal [1977] AC 890, [1976] 2 All ER 641, HL); *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 251, [1956] 1 WLR 29 at 35-36, CA, per Denning LJ; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, sub nom *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897; and see **ESTOPPEL** vol 16(2) (Reissue) PARA 1078.

8 *Re the Local Government Superannuation Acts 1937 and 1939, Algar v Middlesex County Council* [1945] 2 All ER 243 at 251 per Humphreys J; *London County Territorial and Auxiliary Forces Association v Nichols, London County Territorial and Auxiliary Forces Association v Parker* [1949] 1 KB 35 at 50, [1948] 2 All ER 432 at 435, CA, per Scott LJ; *Kai Nam v Ma Kam Chan* [1956] AC 358, [1956] 2 WLR 767, PC.

9 See PARA 28; and **ESTOPPEL** vol 16(2) (Reissue) PARA 1078.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/2. LEGAL CONSEQUENCES AND CLASSIFICATION OF MISTAKE/(2) MISTAKE OF LAW/11. Abolition of distinction between mistake of law and mistake of fact.

## 11. Abolition of distinction between mistake of law and mistake of fact.

The distinction between mistake of law and mistake of fact, in the context of recovery of mistaken payments, has been abolished<sup>1</sup>. Henceforward, a claim to recover money paid by mistake is not to fail merely on the basis that the mistake is one of law<sup>2</sup>.

This poses serious problems for the future. The first is the extent of the change. The abolition of the 'mistake of law' rule in restitutionary claims for money paid under a mistake does not in itself apply to other common law claims based on mistake, that is: (1) claims to recover property alleged not to have passed by reason of mistake; (2) claims based on misrepresentation; and (3) claims where it is alleged that by reason of mistake there was no enforceable contract at all<sup>3</sup>. Nor does it in terms affect the rule against estoppel based on representation as to the general law<sup>4</sup>. However, the common basis of these various claims strongly suggests that the rule should be the same, and for claims falling within heads (2) and (3) this view is now supported by some authority<sup>5</sup>.

The second problem is how the change in the restitutionary rule affects future judicial changes in substantive law. The declaratory theory of judicial decision implies that, where action was taken in the past on the basis of a view of the law later shown (because of a development or change in the common law) to be erroneous, such action was taken on the basis of a mistake of law, even though, on the view held at the time, there was no mistake<sup>6</sup>. But the statutory postponement of the limitation period because of mistake<sup>7</sup> does apply to mistakes of law<sup>8</sup>. Consequently, whenever a higher court changes the law by judicial decision, a fresh six year

limitation period will commence in which payments made, however long ago, on the basis of the old law can be recovered, on the basis that they have been made under a mistake of law<sup>9</sup>. This may also be the case in claims within heads (1) and (2) above, though probably not head (3) (as the claim is not for relief from the consequences of a mistake).

A different aspect of the second problem is the effect on agreements to compromise litigation where the state of the law subsequently changes. Rather than accept that such agreements may be void as made under a mistake of law, the judges have so far preferred to see the compromise of litigation as an exception which, on public policy grounds, is not to be disturbed<sup>10</sup>.

1 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249. This follows statutory and judicial reform elsewhere in the Commonwealth: see eg *Air Canada v British Columbia* (1989) 59 DLR (4th) 161 (Canada); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (Australia); *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (South Africa); *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SLT 299 (Scotland).

2 See PARA 71.

3 See PARA 3.

4 See PARA 28.

5 See *Pankhania v Hackney London Borough Council* [2002] EWHC 2441 (Ch), [2002] NPC 123, at [58], per Mr Rex Tedd; *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321, at [10], [12] per Maurice Kay LJ, and at [63] per Sedley LJ; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 4 All ER 1072, [2004] 1 WLR 1784, at [58] per Potter LJ.

6 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377-384, [1998] 4 All ER 513 at 534-540, HL, per Lord Goff of Chieveley.

7 See the Limitation Act 1980 s 32(1)(c); and **LIMITATION PERIODS** vol 68 (2008) PARA 1230.

8 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 377-389, [1998] 4 All ER 513 at 543-544, HL, per Lord Goff of Chieveley.

9 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 416-418, [1998] 4 All ER 513 at 568-569, HL, per Lord Hope of Craighead; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449.

10 See *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321, at [23] per Maurice Kay LJ, at [31] per Bodey J, and at [63] per Sedley LJ; *Kyle Bay Ltd v Underwriters subscribing to policy no 019057/08/01* [2007] EWCA Civ 57, [2007] Lloyd's Rep IR 460, [2007] All ER (D) 93 (Feb); and PARA 25.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/2. LEGAL CONSEQUENCES AND CLASSIFICATION OF MISTAKE/(3) MISTAKE GENERALLY/(i) Mistake as to Nature of Transaction/12. Mistake as to the nature of a transaction.

### **(3) MISTAKE GENERALLY**

#### **(i) Mistake as to Nature of Transaction**

##### **12. Mistake as to the nature of a transaction.**

A mistake as to the nature, character or effect of a document or other transaction may entitle a party to it to raise the plea of non est factum<sup>1</sup>. The test is whether the document is fundamentally different in nature, character or effect from that which the party intended to

sign<sup>2</sup>. It is a subjective test<sup>3</sup>, but the party relying on the plea must not have been negligent<sup>4</sup>. It is not necessary that there should be any fraud<sup>5</sup>.

In cases where the plea is not available, the erroneous belief of one of the contracting parties in relation to the nature of the obligations which he has undertaken is not sufficient to give him the right to rescind, unless the belief has been induced by the representation, fraudulent or otherwise, of the other party to the contract<sup>6</sup>.

1 As to the plea of non est factum see **CONTRACT** vol 9(1) (Reissue) PARA 687. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 69-73.

2 *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL.

3 *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004 at 1035-1036, [1970] 3 All ER 961 at 980, HL; *United Dominions Trust Ltd v Western* [1976] QB 513 at 523, [1975] 3 All ER 1017 at 1023, CA.

4 *Saunders (Executrix of the Will of Gallie) v Anglia Building Society* [1971] AC 1004, [1970] 3 All ER 961, HL.

5 *Mills v IRC* [1973] Ch 225, [1972] 3 All ER 977, CA; revsd on other grounds sub nom *IRC v Mills* [1975] AC 38, [1974] 1 All ER 722, HL.

6 *Stewart v Kennedy (No 2)* (1890) 15 App Cas 108 at 121-122, HL, per Lord Watson; *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436, 81 JP 81; and see **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 714.

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## (ii) Mistake as to Identity of Party

### 13. Mistake as to the identity of a party.

Subject to the operation of the doctrine of estoppel<sup>1</sup>, where a mistake is made as to the identity of one of the parties to a transaction<sup>2</sup>, there is no agreement formed<sup>3</sup>. But where the mistake is merely as to an attribute of the other party the mistake does not vitiate the transaction at law<sup>4</sup>. The misdescription of the purchaser of land does not render a conveyance inoperative or prevent the legal estate from passing where it can be ascertained who was meant by the person misdescribed<sup>5</sup>.

1 See PARA 28.

2 It does not matter for these purposes whether the person actually exists: *Newborne v Sensolid (Great Britain) Ltd* [1954] 1 QB 45, [1953] 1 All ER 708, CA. As to persons dealing in each other's presence see PARA 14.

3 *Duff v Budd* (1822) 3 Brod & Bing 177 at 183; *Hardman v Booth* (1863) 1 H & C 803; *Heugh v London and North Western Ry Co* (1870) LR 5 Exch 51 at 57-58 per Martin B; *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA. Similarly, where one party intends to give property to another but mistakenly deals with a third, the third party acquires no title: see PARA 28.

4 See *King's Norton Metal Co v Edridge Merrett & Co Ltd*, *King's Norton Metal Co v Roberts* (1897) 14 TLR 98, CA; and PARA 15.

5 *Wray v Wray* [1905] 2 Ch 349, following *Maugham v Sharp* (1864) 17 CBNS 443; *Potter v Duffield* (1874) LR 18 Eq 4; *Lovesy v Palmer* [1916] 2 Ch 233; *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA; *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733 (misdescription of vendor; vendor entitled to specific performance); and see **SALE OF LAND** vol 42 (Reissue) PARA 35.

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#### 14. Parties dealing in each other's presence.

Where the parties are dealing in each other's presence, there is a presumption that each party intends to deal with the person in front of him<sup>1</sup>; but it is clear that this presumption may be rebutted<sup>2</sup>. However, care must be taken to distinguish this situation from the situation where there is a contract, because either no mistake was made at the time of contracting<sup>3</sup>, or because the mistake made at the time of contracting was immaterial to the formation of the contract<sup>4</sup>. The position where an agent is involved is considered later<sup>5</sup>.

1 *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, CA; *Ingram v Little* [1961] 1 QB 31 at 50, [1960] 3 All ER 332 at 336-337, CA, per Sellers LJ, at 57 and 341 per Pearce LJ, and at 66 and 347 per Devlin LJ dissenting. See also *Barclays Bank Ltd v Okenarhe* [1966] 2 Lloyd's Rep 87.

2 See eg *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA. Cf *Lake v Simmons* [1927] AC 487, HL; *Re International Society of Auctioneers and Valuers, Baillie's Case* [1898] 1 Ch 110; *Whittaker v Campbell* [1984] QB 318 at 327, [1983] 3 All ER 582 at 586, CA, per Robert Goff LJ.

3 *Phillips v Brooks Ltd* [1919] 2 KB 243, on the assumption that the rogue made no representation as to his identity until after the contract had been made. This is the explanation of the case offered in *Ingram v Little* [1961] 1 QB 31 at 51, [1960] 3 All ER 332 at 337, CA, per Sellers LJ and at 60 and 343 per Pearce LJ. Of the reports of *Phillips v Brooks Ltd* above three suggest that the rogue said he was Sir George Butler as soon as he entered the shop (88 LJB 953, 35 TLR 470, 24 Com Cas 263) and two suggest that he said this a little later ([1919] 2 KB 243, 121 LT 249). If, in *Phillips v Brooks Ltd* above, the representation as to identity was made before the formation of the contract, an alternative explanation of the case may be that offered in note 4.

4 See eg *Mackie v European Assurance Society* (1869) 21 LT 102; *Smith v Wheatcroft* (1878) 9 ChD 223; *Dennant v Skinner and Collom* [1948] 2 KB 164, [1948] 2 All ER 29 (the auctioneer was prepared to knock the cars down to the rogue whatever his identity). Cf *Fellowes v Lord Gwydyr and Page* (1829) 1 Russ & M 83; *Raffles v Wichelhaus* (1864) 2 H & C 906 (two ships of the same name); *Fung Ping Shan v Tong Shun* [1918] AC 403, PC (conveyance signed by party in name of another).

This may be the explanation of *Phillips v Brooks Ltd* [1919] 2 KB 243 (see note 3); it seems to be offered by Viscount Haldane in *Lake v Simmons* [1927] AC 487 at 501, HL. See also *Fawcett v Star Car Sales Ltd* [1960] NZLR 406, NZ CA.

5 See PARA 15.

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#### 15. Identity and attributes.

While a mistake as to the identity of one of the parties to a transaction prevents the creation of a contract<sup>1</sup>, a mistake which is merely as to an attribute of the other party, for example his wealth or creditworthiness<sup>2</sup>, or even the name of a person there present<sup>3</sup>, does not vitiate the transaction at law<sup>4</sup>. However, as the identity of a person may be described as the sum of his attributes, what at first sight appears to be merely a mistake as to attributes may in fact go to identity<sup>5</sup>.

Special consideration must be given to the situation where the rules of agency are concerned. The general rule is that an agent is not a party to a contract made between his principal and a third party<sup>6</sup>; but this rule may be displaced where the agent purports to contract as co-principal<sup>7</sup>, or by reason of the doctrine of undisclosed principal<sup>8</sup>, or if the distinction in personality between principal and agent is immaterial for the purposes of formation of agreement<sup>9</sup>. Where A intends to contract as principal, but knows that the offeror<sup>10</sup> thinks that A is contracting as agent for P, A cannot for his own benefit accept the offer made to P<sup>11</sup>. Where A intends to contract as agent for P, but knows that the offeror thinks that A is contracting as principal, P will usually be able to take the benefit of the contract by reason of the doctrine of undisclosed principal<sup>12</sup>; but, P will not be able to do so where A knows that the identity of the offeree is material, either in the sense that the offeror positively wishes to contract with A as principal<sup>13</sup>, or does not wish to contract with P<sup>14</sup>.

1 See PARAS 13-14.

2 *King's Norton Metal Co v Edridge Merrett & Co Ltd*, *King's Norton Metal Co v Roberts* (1897) 14 TLR 98, CA.

3 *Phillips v Brooks Ltd* [1919] 2 KB 243; *Lake v Simmons* [1927] AC 487, HL; *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, CA.

4 See, however, the criticism of this distinction between identity and attributes made by Lord Denning MR in *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, CA at 206-207 and at 911.

5 See eg *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA.

6 See **AGENCY** vol 1 (2008) PARA 121 et seq.

7 See eg the Partnership Act 1890 s 5; and **PARTNERSHIP** vol 79 (2008) PARA 45. As to joint promises see **CONTRACT** vol 9(1) (Reissue) PARA 1079 et seq.

8 Under this doctrine, both the agent and the undisclosed principal may sue or be sued by the third party on the contract: see further **AGENCY** vol 1 (2008) PARAS 125, 156 et seq.

9 *Fawcett v Star Car Sales Ltd* [1960] NZLR 406, NZ CA.

10 As to offer and acceptance in the formation of a contract see **CONTRACT** vol 9(1) (Reissue) PARA 631 et seq.

11 *Hardman v Booth* (1863) 1 H & C 803; *Lake v Simmons* [1927] AC 487, HL. See also *Higgons v Burton* (1857) 26 LJ Ex 342; *Morrisson v Robertson* 1908 SC 332, Ct of Sess. Distinguish *Citibank NA v Brown Shipley & Co Ltd*, *Midland Bank plc v Brown Shipley & Co Ltd* [1991] 2 All ER 690, [1991] 1 Lloyd's Rep 576 (mistake as to identity of mere messenger).

12 See note 8.

13 *Greer v Downs Supply Co* [1927] 2 KB 28, CA.

14 *Said v Butt* [1920] 3 KB 497; *Archer v Stone* (1898) 78 LT 34; and see further **AGENCY** vol 1 (2008) PARA 125 et seq.

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### **(iii) Mistake as to Identity of Subject Matter or Terms of Transaction**

#### **16. Admissibility of evidence when contract ambiguous.**

Where the words used in a contract, although clear in themselves, are equally applicable to two different things or subject matters, evidence is admissible to show which of them was the thing or subject matter intended<sup>1</sup>. However, unless the evidence is sufficiently clear to establish satisfactorily that both parties have the same thing or subject matter in view, whether genuinely or by estoppel<sup>2</sup>, there is no contract<sup>3</sup>.

1 *Smith v Jeffries* (1846) 15 M & W 561 at 562 per Alderson B; *Hitchin v Groom* (1848) 5 CB 515 at 520 per Wilde CJ. As to the admissibility of oral evidence to explain the written contract see PARAS 44-48.

2 The party who negligently introduced the ambiguity will be estopped from denying an agreement in the sense in which the other party understood it: *Ireland v Livingstone* (1872) LR 5 HL 395 at 416 per Lord Chelmsford. As to estoppel generally see PARA 28.

3 *Thornton v Kempster* (1814) 5 Taunt 786; *Hodges v Horsfall* (1829) 1 Russ & M 116; *Raffles v Wichelhaus* (1864) 2 H & C 906; *Smidt v Tiden* (1874) LR 9 QB 446; *Falck v Williams* [1900] AC 176, PC; *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564.

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## 17. Effect of false description.

Where the subject matter of a contract is identified with sufficient legal certainty, but there is some inaccuracy in the description or some addition to the description which is inaccurate, the inaccuracy may be rejected according to the maxim *falsa demonstratio non nocet*<sup>1</sup>. Thus where a claimant at the request of the defendant accepts a bill of exchange, and the defendant agrees to indemnify him as to half the amount, it is immaterial that by mistake the bill of exchange is misdescribed as being of the same date as the indemnity when in fact it is dated the next day, if the surrounding circumstances are sufficient to identify the subject matter of the contract<sup>2</sup>.

However, the maxim *falsa demonstratio non nocet* only applies to cases where the false description is added to that which was sufficiently certain before<sup>3</sup>, and therefore, if the words in question form an essential part of the description of the subject matter, they cannot be rejected as *falsa demonstratio*<sup>4</sup>. It also seems that the doctrine is not applicable when the court can see from evidence outside the instrument what it was that the parties really did mean by the particular document in question<sup>5</sup>.

1 A false description does not vitiate: see **CONTRACT** vol 9(1) (Reissue) PARA 774; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 227-228.

2 *Wray v Hearn* (1862) 13 CBNS 292. See also *Carter v Crick* (1859) 4 H & N 412 (vendor sold barley to purchaser by sample, the parties mistakenly calling it and believing it to be seed barley).

3 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 227-228.

4 *Magee v Lavell* (1874) LR 9 CP 107.

5 *Cowen v Truefitt Ltd* [1899] 2 Ch 309 at 311, CA, per Lindley MR.

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## 18. Mistake as to terms.

Where the parties do not in fact agree on what is the subject matter of the contract, for example because A intends to sell one thing, and B to buy another<sup>1</sup>, then, subject to the operation of the doctrine of estoppel<sup>2</sup>, there is no contract between them. The same result follows where the parties do not in fact agree on what are the terms of the agreement<sup>3</sup>.

A mistake as to the terms of the offer must be carefully distinguished from a mistake as to the quality of what is being offered<sup>4</sup>. A mistake as to the terms which are being offered raises problems of offer and acceptance<sup>5</sup>; but a mistake as to the quality of what is being offered usually does not. Whilst in an extreme case, a mistake as to the quality of what is being offered might negative the agreement by destroying the subject matter<sup>6</sup>, it will not usually prevent the formation of an agreement<sup>7</sup> because it is well established that a mistaken motive of one party cannot prevent the formation of an agreement<sup>8</sup>, even if realised by the other party<sup>9</sup>.

One case which deserves special mention is that of a document signed in blank (1) which is intended by the signatory to be an offer; and (2) where the signatory hands the signed document to another to fill in the details; but (3) into which details are inserted which are not in accordance with the instructions of the signatory; and (4) which is then proffered to a third person for his acceptance. In such circumstances, it would appear that it is not open to the signatory to plead non est factum<sup>10</sup>; but in the case of a regulated agreement under the Consumer Credit Act 1974, it will not be properly executed<sup>11</sup>.

1 *Thornton v Kempster* (1814) 5 Taunt 786; *Raffles v Wichelhaus* (1864) 2 H & C 906; *Henkel v Pape* (1870) LR 6 Exch 7; *Falck v Williams* [1900] AC 176, PC. See also PARA 17.

2 See PARA 28.

3 *Smith v Hughes* (1871) LR 6 QB 597; *Gill v McDowell* [1903] 2 Ir 463; *Branwhite v Worcester Works Finance Ltd* [1969] 1 AC 552, [1968] 3 All ER 104, HL.

4 *Smith v Hughes* (1871) LR 6 QB 597 (seller provided a sample).

5 As to offer and acceptance in the formation of a contract see **CONTRACT** vol 9(1) (Reissue) PARA 631 et seq.

6 *Bell v Lever Bros Ltd* [1932] AC 161 at 227, HL, obiter per Lord Atkin.

7 *Bell v Lever Bros Ltd* [1932] AC 161, HL; *Diamond v British Columbia Thoroughbred Breeders' Society and Boyd* (1965) 52 WWR 385, 52 DLR (2d) 146 (BC).

8 *Balfour v Sea Fire Life Assurance Co* (1857) 3 CBNS 300; *Scrivener v Pask* (1866) LR 1 CP 715, Ex Ch; *Pope and Pearson v Buenos Ayres New Gas Co* (1892) 8 TLR 758, CA. Cf *Gill v M'Dowell* [1903] 2 IR 463.

9 *Smith v Hughes* (1871) LR 6 QB 597 at 603 per Cockburn CJ: 'the passive acquiescence of the seller in the self-deception of the buyer will [not] entitle the latter to avoid the contract'; *Statoil ASA v Louis Dreyfus Energy Services LP, The Harriette N* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035, [2008] 2 Lloyd's Rep 685. See also *Turner v Green* [1895] 2 Ch 205. As to contractual terms see **CONTRACT** vol 9(1) (Reissue) PARA 767 et seq.

10 See *United Dominions Trust Ltd v Western* [1976] QB 513, [1975] 3 All ER 1017, CA (expressly holding that *Campbell Discount Co Ltd v Gall* [1961] 1 QB 431, [1961] 2 All ER 104, CA is no longer good law). As to non est factum see **CONTRACT** vol 9(1) (Reissue) PARA 687.

11 See the Consumer Credit Act 1974 ss 61(1)(b), 65; and **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 160, 169.



Fact Materially Connected with Subject Matter of Transaction/19. Common mistake as to existence of subject matter or its essential element.

#### **(iv) Mistake of Fact Materially Connected with Subject Matter of Transaction**

##### **19. Common mistake as to existence of subject matter or its essential element.**

Where parties enter into a contract under a common mistake as to the existence of the subject matter or of some fact or facts forming an integral element of the subject matter, it is a question of construction as to whether either or both of them is or are relieved of liability to perform<sup>1</sup>. In most such cases, both parties are relieved of liability, because the consideration for which each party contracted has failed<sup>2</sup> and, deprived of any effective content, the contract has the appearance of having been void ab initio.

Where the contract concerned is one for the sale of specific goods, and the goods have perished by the time of the contract without the seller's knowledge, by a special statutory rule the contract is void<sup>3</sup>.

In modern times the position has been stated thus: for common mistake to avoid a contract there must be a common assumption as to the existence of a state of affairs as to which there must be no warranty that that state exists, and nor must it be attributable to the fault of either party, but it must render performance of the contract impossible<sup>4</sup>. It has also been said that the mistake must render the subject matter of the contract radically different from the subject matter which the parties believed to exist<sup>5</sup>.

1 *Couturier v Hastie* (1856) 5 HL Cas 673 at 681 per Lord Cranworth LC; *Clark v Lindsay* (1903) 88 LT 198 at 202 per Chanell J; *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, Aust HC; *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 at 460, [1953] 2 All ER 739 at 746-747, CA, per Denning LJ; *Whittaker v Campbell* [1984] QB 318, [1983] 3 All ER 582; cf *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; and see **CONTRACT** vol 9(1) (Reissue) PARA 894.

2 *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273 at 281 per Lindley LJ; *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66, [1962] 1 All ER 474 at 485, CA, per Diplock LJ.

3 See the Sale of Goods Act 1979 s 6; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 54. 'Specific goods' means goods identified and agreed on at the time a contract of sale is made and includes an undivided share, specified as a fraction or percentage, of such goods: see s 61(1) (amended by the Sale of Goods (Amendment) Act 1995 s 2). On the transcription of the common law rules by Sir Mackenzie Chalmers into the Sale of Goods Act 1893 (which was consolidated into the Sale of Goods Act 1979) see *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 70, [1962] 1 All ER 474 at 487, CA, per Diplock J; *Cehave NV v Bremer Handelsgesellschaft mbH, The Hansa Nord* [1976] QB 44 at 59-60, [1975] 3 All ER 739 at 746-747, CA, per Lord Denning MR, at 72-73 and 757 per Roskill LJ, and at 82-83 and 765-766 per Ormrod LJ. See also **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 5.

4 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689, at [76] per Lord Phillips of Worth Matravers MR. See also *Apvodedo Nv v Collins* [2008] EWHC 775 (Ch), [2008] All ER (D) 246 (Apr).

5 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255; *Kyle Bay Ltd v Underwriters subscribing to policy no 019057/08/01* [2007] EWCA Civ 57, [2007] Lloyd's Rep IR 460, [2007] All ER (D) 93 (Feb).

Fact Materially Connected with Subject Matter of Transaction/20. Examples of mistake as to subject matter relieving liability.

## 20. Examples of mistake as to subject matter relieving liability.

In the case of a contract for the sale of a cargo supposed to exist and to be capable of transfer, but which in fact had been sold and delivered to others before the contract was made, it was held that the vendor could not recover the price of the cargo<sup>1</sup>. Similarly, when an annuity is sold after, and in ignorance of the fact that, it has ceased to exist, the purchase money may be recovered as having been paid without consideration<sup>2</sup>; and it is likewise if parties to litigation over certain chattels enter into a consent order on the common but mistaken belief that the chattels concerned were never fixed to the soil and have never become fixtures<sup>3</sup>. The same result was held to have occurred where a contract of hire of a room to watch a procession was entered into in ignorance of the existing fact of the cancellation of the procession<sup>4</sup>.

Where a fund is held in trust for two persons equally, if living, with benefit of survivorship between them, and one of them sells his reversionary interest, the other being dead at the time, and that fact is not known either to the vendor or to the purchaser, the contract will not be enforced<sup>5</sup>. Again, if a premium is paid and accepted for the renewal of a policy after the death of the insured, even though both parties are ignorant of his death, the payment does not in such circumstances revive the policy<sup>6</sup>. And where a contract for the sale of a policy on the life of a man who is dead is entered into by both parties, in the belief that the assured is alive, and is completed by assignment, the transaction will be set aside<sup>7</sup>.

For the same reason, if a deed of separation is entered into between the parties in the belief that they were respectively husband and wife, whereas in fact they were not lawfully married, neither party is obliged to perform<sup>8</sup>. Similarly, parties who make a contract for the exploitation by A of a crop on B's land<sup>9</sup>, or for the mining by A of clay from B's land<sup>10</sup>, which the land could never produce are not liable to perform.

1 *Couturier v Hastie* (1856) 5 HL Cas 673 (contract contemplated that something existed to be sold, which in the event was not the case). This case was decided prior to the enactment of the Sale of Goods Act 1893 (now consolidated into the Sale of Goods Act 1979): see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 5-6.

2 *Strickland v Turner* (1852) 7 Exch 208; *Kennedy v Thomassen* [1929] 1 Ch 426.

3 *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA.

4 *Griffith v Brymer* (1903) 19 TLR 434 (mistake as to the state of facts went to root of the matter; contract void). See also *Clark v Lindsay* (1903) 88 LT 198.

5 *Colyer v Clay* (1843) 7 Beav 188 (contract could not be performed).

6 *Pritchard v Merchants' and Tradesmen's Life Assurance Society* (1858) 3 CBNS 622.

7 *Scott v Coulson* [1903] 2 Ch 249, CA.

8 *Galloway v Galloway* (1914) 30 TLR 531, DC; *Law v Harragin* (1917) 33 TLR 381.

9 *Sheikh Bros Ltd v Ochsner* [1957] AC 136, [1957] 2 WLR 254, PC (mistake as to a matter of fact which was essential to the agreement).

10 *Lord Clifford v Watts* (1870) LR 5 CP 577 (on the construction of the deed, it was the intention of the parties that the covenant to dig the specified amount of clay should only take effect if that amount of clay existed in the land).

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## 21. Mistake as to subject matter not relieving from liability.

There are cases, however, where, on the true construction of the contract, one party or the other bore the risk that the facts would turn out differently from supposed, and that person was held liable under a contract to perform accordingly<sup>1</sup>. In considering the contractual allocation of risk in the absence of warranty, the maxim *caveat emptor* is relevant<sup>2</sup>, and hence a builder was held liable under a contract to buy land for development through which, unknown to both parties, a large sewer ran<sup>3</sup>.

In particular, when a contract is for the sale of something absolutely and not with reference to any collateral circumstances, the agreement is binding if the thing specified exists, notwithstanding that it is not in the condition supposed<sup>4</sup>. And where a bargain is entered into which depends on a contingent event of which chance both the parties are aware<sup>5</sup>, or is for the sale of an uncertain speculative property<sup>6</sup>, or depends on the parties' view of the then value<sup>7</sup>, or likely events<sup>8</sup>, or information provided by a third party<sup>9</sup>, neither of the contracting parties will be discharged from liability merely because the event turns out against him or the reality is different from what was expected. It will be likewise if a contract purports to sell property not belonging to either party, but to a third party<sup>10</sup>, or where a contract is to sell land with a certain building on it, the purchaser having made no requisitions or objections to title, or had any survey performed, and it is afterwards discovered that the building was partly on and partly off the land conveyed<sup>11</sup>.

There are also cases where the contract has been held not void at law, but voidable in equity because of a mistake as to subject matter<sup>12</sup>, but these must now be treated as being no longer authoritative<sup>13</sup>.

1 See eg *Barr v Gibson* (1838) 3 M & W 390; *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, Aust HC; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; cf *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255 (subject matter of lease and guarantee non-existent; guarantee contained condition precedent that lease related to existing machines; contract void ab initio).

2 Literally 'buyer beware': see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 77.

3 *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA.

4 *Barr v Gibson* (1838) 3 M & W 390 at 400 (sale of a ship which at the time was a wreck); *Barker v Janson* (1868) LR 3 CP 303 (at the time the ship was insured, it had been damaged in a storm).

5 *Mortimer v Capper* (1782) 1 Bro CC 156; *Hitchcock v Giddings* (1817) 4 Price 135 at 140 per Richards CB; *Clark v Lindsay* (1903) 88 LT 198 at 202 per Channell J.

6 *Ridgeway v Sneyd* (1854) Kay 627; *Baxendale v Seale* (1855) 19 Beav 601 at 608, 612 per Sir John Romilly MR; *Jefferys v Fairs* (1876) 4 ChD 448 (licence to search for vein of coal was granted; warranty that vein existed had not been granted); *McRae v Commonwealth Disposals Commission* (1950) 84 CLR 377, Aust HC (contract alleged existence of tanker; no tanker in fact existed; plaintiff was only entitled to recover damages).

7 *Barker v Janson* (1868) LR 3 CP 303 (see note 4); *Clark v Lindsay* (1903) 88 LT 198.

8 *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA; cf *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255 (see note 1).

9 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689.

10 *Clare v Lamb* (1875) LR 10 CP 334 (defendants purported to convey to plaintiff an equity of redemption to which they mistakenly believed they were entitled; plaintiff could not recover money, on the basis *caveat emptor* applied); cf *Barber v NWS Bank plc* [1996] 1 All ER 906, [1996] 1 WLR 641, CA (purchaser entitled to rescind finance agreement). See also *Bell v Lever Bros Ltd* [1932] AC 161 at 218, HL, per Lord Atkin.

11 *Svanioso v McNamara* (1956) 96 CLR 186, Aust HC.

12 See *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA; *Peters v Batchelor* (1950) 100 L Jo 718, CA; *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891 at 893, CA, per Lord Denning MR; *Curtin v Great London Council* (1971) 69 LGR 281 at 284, CA, per Lord Denning MR; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128.

13 See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, *The Great Peace* [2002] EWCA Civ 1407 at [153]-[160], [2003] QB 679 at [153]-[160], [2002] 4 All ER 689 at [153]-[160] per Lord Phillips of Worth Matravers MR (disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA); see also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 952, [1994] 1 WLR 1016, CA, per Hoffmann LJ (doubting *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128); and PARA 53.

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## 22. Mistakes as to quality.

Where the parties enter a contract under a mistake as to some quality of the subject matter, in principle the same inquiry should follow as with mistakes as to existence, that is, whether on the true construction of the contract either or both of the parties was nonetheless to be liable to perform<sup>1</sup>. Where the contractual intention was that the subject matter was to have that quality, and it did not, then prima facie the supplier is in breach of his contract<sup>2</sup>, and the recipient has his remedies (which may include being relieved of liability to perform)<sup>3</sup>. Where there is no such intention, it is unlikely that the mistake as to quality will be construed as sufficient for either or both parties to be relieved of liability to perform<sup>4</sup>. Thus if goods are sold under a known trade description and they match that description<sup>5</sup>, or if they are sold by sample and they match the sample<sup>6</sup>, the fact that both parties mistakenly believe such goods to have a particular quality is irrelevant, even though their mistake is fundamental. Where a company paid a large sum to determine service contracts which (unknown to it) it might have determined for nothing, the company was still bound<sup>7</sup>; likewise the agreement was binding where a vessel was chartered to provide immediate short-term assistance in a salvage operation, but it was later discovered that it would take longer than anticipated for the vessel to join the operation owing to a common mistake as to its location<sup>8</sup>.

1 See PARAS 19-21.

2 *Gompertz v Bartlett* (1853) 2 E & B 849 at 853 per Lord Campbell CJ.

3 As to mistakes as to quality relieving from liability see PARA 23. As to remedies see PARA 38 et seq.

4 *Scott v Little Dale* (1858) 8 E & B 815; *Frederick E Rose & Co (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 at 459, [1953] 2 All ER 739 at 745, CA, per Singleton LJ; *Oscar Chess Ltd v Williams* [1957] 1 All ER 325 at 326-327, [1957] 1 WLR 370 at 373, CA, per Denning LJ (description of car as a 1948 model was not intended to be a term of the contract). See also *R v Morris*, *Anderton v Burnside* [1983] 3 All ER 288, [1984] AC 320, HL, doubting *Dip Kaur v Chief Constable of Hampshire* [1981] 2 All ER 430, [1981] 1 WLR 578.

5 *Harrison & Jones Ltd v Bunten & Lancaster Ltd* [1953] 1 QB 646, [1953] 1 All ER 903; and see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 74.

6 *Carter v Crick* (1859) 4 H & N 412.

7 *Bell v Lever Bros Ltd* [1932] AC 161, HL (mistake went to quality, not the subject matter, of the service contracts). See also **CONTRACT** vol 9(1) (Reissue) PARA 22.

8 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689.

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### 23. Mistakes as to quality relieving from liability.

There are cases where the parties will be relieved from performance because of their mistake as to quality<sup>1</sup>. The difficulty is to determine whether the mistake goes to the substance of the whole consideration<sup>2</sup>.

In one case of a contract for the sale of a parcel of 700 bags of nuts, where unknown to the parties only 591 such bags existed, both parties were held relieved of liability to perform<sup>3</sup>. In another case a purchaser agreed to buy an estate which, unknown to him, already belonged to him; as neither party was obliged to perform in those circumstances, the purchaser could recover back the price paid<sup>4</sup>. Again, where a finance company accepted an offer to buy a car on hire-purchase which, unknown to the parties, had by then been stolen and severely damaged, neither party was liable under the contract<sup>5</sup>. Finally, where a company issued bonus shares as fully paid in the belief that it had power to do so, but in fact in the circumstances it had power only to issue such shares nil paid, the whole issue was void<sup>6</sup>.

These cases are to be contrasted with the cases in which the parties got what they bargained for<sup>7</sup>.

1 See *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1988] 3 All ER 902 at 909-911, [1989] 1 WLR 255 at 264-269 per Steyn J. As to mistakes as to quality generally see PARA 22.

2 *Kennedy v Panama, New Zealand and Australia Royal Mail Co (Ltd)* (1867) LR 2 QB 580.

3 *Barrow Lane & Ballard Ltd v Phillips & Co Ltd* [1929] 1 KB 574 (the parties contracted about something which at the date of the contract, unknown to the parties, did not exist).

4 *Bingham v Bingham* (1748) 1 Ves Sen 126; *Cooper v Phibbs* (1867) LR 2 HL 149 (tenant took lease of land belonging to landlord at law, but belonging to himself in equity); Matthews 'A Note on *Cooper v Phibbs*' (1989) 105 LQR 599. See also *Bell v Lever Bros Ltd* [1932] AC 161 at 218, HL, per Lord Atkin; *Norwich Union Fire Insurance Society v WH Price Ltd* [1934] AC 455 at 463, PC; *Bligh v Martin* [1968] 1 All ER 1157 at 1162, [1968] 1 WLR 804 at 813-814 per Pennycuik J.

5 *Financings Ltd v Stimson* [1962] 3 All ER 386, [1962] 1 WLR 1184, CA.

6 *EIC Services Ltd v Phipps* [2004] EWCA Civ 1069, [2005] 1 All ER 338, [2005] 1 WLR 1377.

7 See eg the cases cited in PARA 22.

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## 24. Unilateral mistake as to quality.

A fundamental mistake on the part of one party only, not actively caused or contributed to by any other party or his agent<sup>1</sup>, not as to the terms, but as to the quality of the subject matter of the agreement does not invalidate the agreement<sup>2</sup>, or otherwise give ground for relief in equity<sup>3</sup>, even where the other party knows of the mistake<sup>4</sup>, unless in the circumstances he has misled the mistaken party<sup>5</sup>, or his knowledge and failure to disabuse him amounts to equitable fraud<sup>6</sup>, or there is a duty to speak breach of which may found an estoppel<sup>7</sup>.

There are old cases of unilateral mistake where equity intervened because one party perceived the mistake of the other and took advantage of it<sup>8</sup>, as where a parent took advantage of a child just come of age<sup>9</sup> or where persons ignorant of their rights released them to a person knowing of them<sup>10</sup>, or where the mistaken party could properly be regarded as a 'poor and ignorant person'<sup>11</sup>, but these must now be read in light of the general principle stated above<sup>12</sup>.

1 See eg *Thornton v Kempster* (1814) 5 Taunt 786 (broker employed by seller and buyer to negotiate sale gave to buyer a sale note for Riga Rhine hemp instead of St Petersburg hemp); *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564 (defendants made a bid for tow at auction under the belief it was hemp; form of catalogue prepared by auctioneer contributed to defendants' mistake).

2 *Morley v Clavering* (1860) 29 Beav 84 (restrictive covenants in a lease); *Smith v Hughes* (1871) LR 6 QB 597 (new oats bought in the belief they were old oats); *Johnson v Islington Union* (1909) 73 JP 172 (tender for goods). See also **CONTRACT** vol 9(1) (Reissue) PARA 22.

3 *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *George Wimpey UK Ltd v VIC Construction Ltd* [2005] EWCA Civ 77, 103 ConLR 67, [2005] BLR 135, [2005] All ER (D) 37 (Feb); *Statoil ASA v Louis Dreyfus Energy Services LP, The Harriette N* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035, [2008] 2 Lloyd's Rep 685, at [105] per Aikens J.

4 *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J; *Statoil ASA v Louis Dreyfus Energy Services LP, The Harriette N* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035, [2008] 2 Lloyd's Rep 685, at [88] per Aikens J.

5 *Goddard v Jeffreys* (1881) 51 LJ Ch 57; *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Jennings v Jennings* [1898] 1 Ch 378; *Faraday v Tamworth Union* (1916) 86 LJ Ch 436, 81 JP 81.

6 *Monaghan County Council v Vaughan* [1948] IR 306 at 315 per Dixon J; *Pateman v Pay* (1974) 232 Estates Gazette 457; *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Redbridge London Borough Council v Robinson Rentals Ltd* (1969) 211 Estates Gazette 1125; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Taylor v Johnson* (1983) 151 CLR 422.

7 See PARA 28.

8 *Cocking v Pratt* (1750) 1 Ves Sen 400; *M'Carthy v Decaix* (1831) 2 Russ & M 614 at 622 per Lord Brougham LC; *Sturge v Sturge* (1849) 12 Beav 229; *Coward v Hughes* (1855) 1 K & J 443 at 449 per Page Wood V-C; *Broughton v Hutt* (1858) 3 De G & J 501.

9 *Cocking v Pratt* (1750) 1 Ves Sen 400; *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1 at 10 per Brett MR and at 17 per Fry LJ.

10 *Cann v Cann* (1721) 1 P Wms 723 at 727 per Macclesfield LC; *Pusey v Desbouvrie* (1734) 3 P Wms 315; *Ramsden v Hyllton* (1751) 2 Ves Sen 304; *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1, CA.

11 *Fry v Lane* (1888) 40 ChD 312; *Cresswell v Potter* (1968) [1978] 1 WLR 255n.

12 *Riverlate Properties v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 896; **EQUITY** vol 16(2) (Reissue) PARA 441.

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## 25. Compromises and family arrangements.

Agreements to compromise litigation or to avoid disputes are contracts governed by the ordinary rules of the law of contract<sup>1</sup>. Hence in principle they should be capable of being vitiated by common mistake of law<sup>2</sup>. However, it will be a question of construction whether an alleged mistake has that consequence<sup>3</sup>. For example, general words are unlikely to be interpreted as giving up rights of which the parties were then unaware<sup>4</sup>. Moreover, there are public policy considerations to be taken into account<sup>5</sup>. Thus, where there is a 'give-and-take' settlement of claims, a compromise will not be set aside even if subsequently it appears that the parties were mistaken on a point of law<sup>6</sup>. The position is even more so when there is simply doubt as to what the law is, rather than a mistaken belief<sup>7</sup>.

Equity will also relieve a party who, in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another under the name of a compromise<sup>8</sup>. Similarly, relief may be granted where parties, being ignorant of facts on which their rights depend or erroneously assuming that they know their rights, deal with the property accordingly and not upon the principle of compromising doubts<sup>9</sup>. A compromise based on a mutual mistake of account inducing the compromise will also be set aside<sup>10</sup>. There are also cases in which transactions with 'poor and ignorant persons' have been set aside<sup>11</sup>.

1 *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* [1895] 2 Ch 273, CA.

2 See PARA 11.

3 *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321, at [10] per Maurice Kay LJ.

4 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8 at [9]-[10], [2002] 1 AC 251 at [9]-[10], [2001] 1 All ER 961 at [9]-[10] per Lord Bingham of Cornhill.

5 *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321.

6 *Huddersfield Banking Co Ltd v Henry Lister & Sons Ltd* [1895] 2 Ch 273, CA; *Holsworthy UDC v Holsworthy RDC* [1907] 2 Ch 62; *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321; *Kyle Bay Ltd v Underwriters subscribing to policy no 019057/08/01* [2007] EWCA Civ 57, [2007] Lloyd's Rep IR 460, [2007] All ER (D) 93 (Feb).

7 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 410, [1998] 4 All ER 513 at 562, HL, per Lord Hope of Craighead; and also *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch), [2009] BPIR 1315, [2009] All ER (D) 171 (Aug) (revsd in part sub nom *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd*, *Butters v BBC Worldwide Ltd* [2009] EWCA Civ 1160, (2009) Times, 16 November, [2009] All ER (D) 87 (Nov)). See further PARA 11.

8 *Naylor v Winch* (1824) 1 Sim & St 555 at 564 per Sir John Leach V-C (affd (1828) 7 LJOS Ch 6); *Re Roberts, Roberts v Roberts* [1905] 1 Ch 704, CA.

9 See **SETTLEMENTS** vol 42 (Reissue) PARA 1018.

10 *Pritt v Clay* (1843) 6 Beav 503; *Stainton v Carron Co* (1861) 30 LJ Ch 713.

11 See PARA 24.

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## (v) Effect on Property

### 26. Mistake preventing the passing of property: persons and formalities.

The passing of property is determined not by the validity or invalidity of an associated contract<sup>1</sup>, but by the intention of the owner. Accordingly, sometimes property passes<sup>2</sup>, and sometimes it does not<sup>3</sup>. Where A intends to pass property in money<sup>4</sup> or other chattels<sup>5</sup> by delivery to B, but mistakenly delivers to C, property does not pass either to B or to C.

Where A intends to pass property by deed to B, but misdescribes him, the court will give effect to it if B's identity can be ascertained<sup>6</sup>. If A intends B but mistakenly names C, the court may rectify the deed<sup>7</sup>.

If, by mistake, the wrong person is registered as proprietor of registered land, property passes to that person<sup>8</sup>, but the register may be rectified so as to correct the mistake<sup>9</sup>. Where A intends to pass property to B, but mistakenly fails to comply with the relevant legal formalities, property will not pass at law<sup>10</sup>. It may pass in equity if B has given valuable consideration<sup>11</sup>, or relies on the purported gift to his prejudice<sup>12</sup>, or is subsequently appointed A's executor<sup>13</sup>, or perhaps administrator<sup>14</sup>, but otherwise equity will not perfect an imperfect gift<sup>15</sup>.

Conversely, property in chattels will pass from their owner to the owner of the land to which they are affixed, whatever the original owner's intention<sup>16</sup>. Where two chattels are joined together, the matter is less certain<sup>17</sup>. There is some authority that the lesser accedes to the greater<sup>18</sup>, as in Roman law. In Scotland there is co-ownership<sup>19</sup>, as there is in England in the case of mixtures<sup>20</sup>.

1 Cf *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [2004] 1 All ER 215 (dealing with the effect of the Hire Purchase Act 1964 s 27 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 55-56)); and see also Swedling 'Rescission, Property and the Common Law' (2005) 121 LQR 123.

2 *Stocks v Wilson* [1913] 2 KB 235; *Phillips v Brooks Ltd* [1919] 2 KB 243; *Singh v Ali* [1960] AC 167, [1960] 1 All ER 269, PC; *Lewis v Averay* [1972] 1 QB 198, [1971] 3 All ER 907, CA.

3 *Cundy v Lindsay* (1878) 3 App Cas 459, HL; *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA; and see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 155.

4 *R v Middleton* (1873) LR 2 CCR 38; *Morgan v Ashcroft* [1938] 1 KB 49 at 64-66, [1937] 3 All ER 92 at 97-98, CA, per Sir Wilfred Greene MR.

5 *Hoare v Great Western Rly* (1877) 37 LT 186 at 187 per Lord Coleridge CJ; *Lancashire and Yorkshire Rly Co v MacNicol* (1918) 118 LT 596; *R v Hudson* [1943] KB 458, [1943] 1 All ER 642, CCA; *Ingram v Little* [1961] 1 QB 31, [1960] 3 All ER 332, CA.

6 *Wray v Wray* [1905] 2 Ch 349, 74 LJ Ch 687; and see PARAS 13-15.

7 See PARA 35.

8 See the Land Registration Act 2002 s 58; and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 859.

9 See the Land Registration Act 2002 s 65, Sch 4; *Norwich and Peterborough Building Society v Steed* [1993] Ch 116, [1993] 1 All ER 330, CA (decided under corresponding provisions of the Land Registration Act 1925 (repealed)); and **LAND REGISTRATION** vol 26 (2004 Reissue) PARA 976 et seq.

10 *Jones v Lock* (1865) 1 Ch App 25; *Richards v Delbridge* (1874) LR 18 Eq 11; *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA. As to the legal formalities see **CONTRACT** vol 9(1) (Reissue) PARAS 620-628; **REAL PROPERTY** vol 39(2) (Reissue) PARA 232 et seq. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 23-24.



- 11 *Holroyd v Marshall* (1862) 10 HL Cas 191; *Pullan v Koe* [1913] 1 Ch 9.
- 12 *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; and see PARA 33.
- 13 *Strong v Bird* (1874) LR 18 Eq 315; and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 22.
- 14 *Re Gonin* [1979] Ch 16, [1977] 2 All ER 720.
- 15 *Milroy v Lord* (1862) 4 De GF & J 264; *Pappadakis v Pappadakis* (2000) Times, 19 January; cf *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA.
- 16 *Gough v Wood & Co* [1894] 1 QB 713, CA.
- 17 See Guest 'Accession and Confusion in the Law of Hire Purchase' (1964) 27 MLR 505.
- 18 *Wood v Ash and Foster* (1586) Owen 139; *Appleby v Myers* (1867) LR 2 CP 651 at 659-660, Ex Ch, per Blackburn J; *Seath v Moore* (1886) 11 App Cas 350 at 380-381, HL, per Lord Watson; *Lewis v Andrews & Rowley Pty Ltd* [1956] SR NSW 439 at 443 per Ferguson J.
- 19 *Wylie and Lochhead v Mitchell* (1870) 8 M 552.
- 20 *Indian Oil Corp'n v Greenstone Shipping SA* [1988] QB 345, [1987] 3 All ER 893; and see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1239.

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## 27. Mistake preventing the passing of property: other mistakes.

If A by mistake hands over to B property different from that which he intends to hand over, it appears that property does not pass at law<sup>1</sup>.

If A intends to pass property to B and complies with the relevant formalities then as a general rule, and subject to any estoppel<sup>2</sup>, property passes at law<sup>3</sup>. It does not matter if A was mistaken as to some other matter which was the motive for the transaction, for example that B was poor, when in fact he is rich<sup>4</sup>, or that A owed B the sum paid, when in fact he did not<sup>5</sup>.

There is some authority for saying that if A pays B money under a factual mistake he retains an equitable property in it<sup>6</sup>, but this has been doubted<sup>7</sup>. In addition, it appears that, where A gives to B under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given, the court may set aside the gift in equity<sup>8</sup>. A gift by a husband to his wife, not realising that the property would fall within a covenant to settle after-acquired property in their marriage settlement<sup>9</sup>; a release by a father of his protected life interest in favour of his children (the remaindermen), not realising that this would cause a forfeiture and impose a discretionary trust<sup>10</sup>; and a transfer made for the purpose of reducing liability to inheritance tax in the mistaken belief by the transferor that he had a real chance of surviving for the requisite period<sup>11</sup>, have all been set aside in equity on the ground of mistake<sup>12</sup>. The test has been stated to be whether the mistake is as to the effects of the transaction, rather than as to the consequences (usually fiscal); in the former case it may be set aside, in the latter not<sup>13</sup>. However, the distinction has been doubted<sup>14</sup>, and not followed<sup>15</sup>.

1 *R v Ashwell* (1885) 16 QBD 190 at 201; cf *Ilich v R* (1987) 162 CLR 110.

2 *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Graeser Ltd v MacNicoll* (1918) 118 LT 596; and see PARA 28.

- 3 *Ogilvie v Littleboy* (1897) 13 TLR 399, CA; affd (1899) 15 TLR 294, HL.
- 4 *Wilson v Thornbury* (1875) 10 Ch App 239; *Morgan v Ashcroft* [1938] 1 KB 49 at 66, [1937] 3 All ER 92 at 98, CA, per Sir Wilfrid Greene MR.
- 5 *Moynes v Cooper* [1956] 1 QB 439, [1956] 1 All ER 450; *Ilich v R* (1987) 162 CLR 110.
- 6 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, [1979] 3 All ER 1025; *R v Shadrokh-Cigari* [1988] Crim LR 465, CA. See also *IVS Enterprises Ltd v Chelsea Cloisters Management Ltd* [1994] EGCS 14, 13 TLI 111, CA.
- 7 *Westdeutsche Landsbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 714, [1996] 2 All ER 961 at 996, HL, per Lord Browne-Wilkinson.
- 8 *Ogilvie v Littleboy* (1897) 13 TLR 399; affd (1899) 15 TLR 294; *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch), [2009] Ch 162, [2008] 2 All ER 654. See also *Re Glubb, Bamfield v Rogers* [1900] 1 Ch 354, CA (innocent misrepresentation causing mistaken gift); and **GIFTS** vol 52 (2009) PARA 261.
- 9 *Ellis v Ellis* (1909) 26 TLR 166.
- 10 *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304. See also *Dent v Dent* [1996] 1 All ER 659 at 669, [1996] 1 WLR 683 at 693 per David Young QC; and *AMP (UK) Ltd plc v Barker* (2000) 3 ITEL 414 at [80]-[82] per Lawrence Collins J.
- 11 *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch), [2009] Ch 162, [2008] 2 All ER 654. See also *Bhatt v Bhatt* [2009] EWHC 734 (Ch), [2009] STC 1540, [2009] All ER (D) 58 (Apr) (transfer of assets following erroneous tax advice set aside).
- 12 See also PARA 54.
- 13 *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304.
- 14 *Anker-Petersen v Christensen* [2001] All ER (D) 54 (Oct); *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693, [2005] 1 WLR 3811, 8 ITEL 93, at [106] per Lloyd LJ; *Wolff v Wolff* [2004] EWHC 2110 (Ch), [2004] STC 1633, [2004] WTLR 1349, [2004] NPC 135, [2004] All ER (D) 28 (Sep).
- 15 *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch), [2009] Ch 162, [2008] 2 All ER 654; *Fender (administrator of FG Collier & Sons Ltd) v National Westminster Bank plc* [2008] EWHC 2242 (Ch), [2008] 48 EG 102, [2008] 40 EG 177 (CS).

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## **(vi) Limitations on Mistake**

### **28. Estoppel.**

The doctrine of estoppel constitutes an important limitation on the principles governing the law of mistake. It operates in two ways.

First, where there is no genuine consensus between the parties, and therefore prima facie there should be no contract, it may nonetheless have effect to prevent a party from denying that a consensus with the other party exists. Thus it may enable a party to succeed on a claim on which, without the estoppel, he would have failed<sup>1</sup>. This can apply in relation to mistake as to the parties<sup>2</sup>, mistake as to the subject matter<sup>3</sup>, or indeed mistake as to any other terms of a contract<sup>4</sup>. It is no objection that the estoppel relates to questions of private rights or construction issues<sup>5</sup>, and although the law in this area, at the date at which this volume states it, is in a state of flux, it still seems that there can be no estoppel as to matters of general law<sup>6</sup>.

For an estoppel to operate, there must be a representation (by words or conduct) by one party as to the position, intended by that party to be acted upon by the other<sup>7</sup>, believed<sup>8</sup> and acted upon by the other, so that he would be worse off if the first party were able to go back on his representation<sup>9</sup>. For this purpose, giving his promise and thereby making the contract is a sufficient act in reliance<sup>10</sup>, because it deprives him of the opportunity to decide to do otherwise<sup>11</sup>. If the representor makes the representation, it does not matter what his real intention was<sup>12</sup>, or whether he realised that what he was representing was not true<sup>13</sup>, so long as a reasonable man would take the representation to be true, and believe that it was intended to be acted upon<sup>14</sup>. Moreover, equity will not rescind the common law agreement on the basis of unilateral mistake by the representor<sup>15</sup>.

Secondly, estoppel may operate in equity where a party has a duty to speak, but remains silent<sup>16</sup>. If A realises that B mistakenly believes that A owes an obligation to B (or that B has a right against A) which would be to B's disadvantage if A thereafter denied the obligation, A is under a duty to disclose the non-existence of the obligation or right in question<sup>17</sup>. Failure to disclose this amounts to a representation (that is, that there are no circumstances negating the existence of the obligation or right) which, acted on by B to his detriment, may found an estoppel. In this equitable form of estoppel A's actual knowledge of B's mistake is critical, or else he has no duty to speak out<sup>18</sup>.

1 *Pearl Mill Co Ltd v Ivy Tannery Co Ltd* [1919] 1 KB 78 at 83-84 per McCardie J; *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 251, [1956] 1 WLR 29 at 36, CA, per Denning LJ, and at 255 and 43 per Morris LJ; *Crabb v Arun District Council* [1976] Ch 179 at 187, [1975] 3 All ER 865 at 871, CA, per Lord Denning MR; *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 105, [1981] 1 All ER 923 at 936-937 per Robert Goff J (affd [1982] QB 84, [1981] 3 All ER 577, CA); *Wilson (Paal) & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854 at 914, [1983] 1 All ER 34 at 47, HL, per Lord Brandon of Oakbrook, and at 916 and 49 per Lord Diplock.

2 *Cornish v Abington* (1859) 4 H & N 549; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.

3 *Scott v Littledale* (1858) 8 E & B 815; *Van Praagh v Everidge* [1902] 2 Ch 266 (revsd on other grounds [1903] 1 Ch 434, CA); *Robinson, Fisher and Harding v Behar* [1927] 1 KB 513.

4 *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J; *Haymen v Gover* (1872) 25 LT 903; *Harris v Great Western Rly* (1876) 1 QBD 515 at 530 per Blackburn J; *Islington Union v Brentnall and Cleland* (1907) 71 JP 407, 5 LGR 1219; *Howatson v Webb* [1908] 1 Ch 1, CA; cf *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430 at 436-437, [1964] 1 WLR 125 at 133-134, HL, per Lord Devlin.

5 See PARA 10.

6 See PARA 10; cf *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321.

7 *Freeman v Cooke* (1848) 2 Exch 654 at 663 per Parke B; *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 317 per Brett J; *Re Henry Bentley & Co and the Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204 at 207 per Lindley J.

8 *Hartog v Colin and Shields* [1939] 3 All ER 566; *Lloyd's Bank Ltd v Brooks* (1950) 6 Legal Decisions Affecting Bankers 161; *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] SGCA 2, [2006] 1 LRC 37, Sing CA.

9 As to estoppel by representation see **ESTOPPEL** vol 16(2) (Reissue) PARA 1052 et seq.

10 *Manchester and Oldham Bank Ltd v WA Cook & Co* (1883) 49 LT 674 at 678-679 per Day J; *Lundberg v Royal Exchange Assurance Corp* [1933] NZLR 605 at 615 per Reed J.

11 *Knights v Wiffen* (1870) LR 5 QB 660 at 665 per Blackburn J; *Dixon v Kennaway & Co* [1900] 1 Ch 833 at 842 per Farwell J; *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774, CA; *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove* [1990] Ch 237, [1989] 2 All ER 655.

12 *Sarat Chunder Dey v Gopal Chunder Lala* (1892) LR 19 Ind App 203, PC; *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674 at 695.

13 *Van Praagh v Everidge* [1902] 2 Ch 266 (revsd on other grounds [1903] 1 Ch 434, CA); *Islington Union v Brentnall and Cleland* (1907) 71 JP 407, 5 LGR 1219; *Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223-224, CA, per Sir Raymond Evershed MR; *Spiro v Lintern* [1973] 3 All ER 319 at 328, [1973] 1 WLR 1002 at 1012, CA, per Buckley LJ.

14 *Freeman v Cooke* (1848) 2 Exch 654 at 663 per Parke B; *Carr v London and NorthWestern Rly Co* (1875) LR 10 CP 307 at 317 per Brett J; *Re Henry Bentley & Co and the Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204 at 207, CA, per Lindley LJ.

15 *Australia Hotel Co Ltd v Moore* (1899) 20 LR NSW Eq 155 at 160; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

16 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1059.

17 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.

18 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 140-141 per Lord Cranworth LC; *Willmott v Barber* (1880) 15 ChD 96 at 106, CA, per Fry J; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.

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## 29. Objective view.

Modern cases support an alternative view, that the strict principle of consensus is tempered, not by estoppel<sup>1</sup>, but by an objective principle, that is, that one party is bound if his words or conduct are such as to induce the other party reasonably to believe that the first was assenting to the terms proposed by the second<sup>2</sup>. These cases are, however, also consistent with estoppel. The matter is controversial<sup>3</sup>, but there is no doubt that estoppel is a general doctrine, not confined to contracts<sup>4</sup>, whilst the objective principle is only applicable to contract<sup>5</sup>.

1 See PARA 28.

2 *Taylor v Johnson* (1983) 151 CLR 422; *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158, CA; *Whittaker v Campbell* [1984] QB 318 at 326-327, [1983] 3 All ER 582 at 585-586, DC, per Robert Goff LJ; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, CA; *Food Corp'n of India v Antclizo Shipping Corp'n, 'The Antclizo'* [1987] 2 Lloyd's Rep 130, CA (affd [1988] 2 All ER 513, [1988] 1 WLR 603); *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [2004] 1 All ER 215 at [65], [81] and [87] per Lord Millett, at [123] per Lord Phillips of Worth Matravers MR, and at [183] per Lord Walker.

3 See Atiyah 'Contracts, Promises and the Law of Obligations' (1978) 94 LQR 193; Atiyah 'The Hannah Blumenthal and Classical Contract Law' (1986) 102 LQR 363 at 364-365.

4 See eg *Pickard v Sears* (1837) 6 Ad & El 469 (trover); *Freeman v Cooke* (1848) 2 Exch 654 (trover); *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Graeser Ltd v MacNicoll* (1918) 118 LT 596 (passing of property by delivery).

5 *Taylor v Johnson* (1983) 151 CLR 422; *Centrovincial Estates plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158, CA; *Whittaker v Campbell* [1984] QB 318 at 326-327, [1983] 3 All ER 582 at 585-586, DC, per Robert Goff LJ; *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, CA; *Food Corp'n of India v Antclizo Shipping Corp'n, 'The Antclizo'* [1987] 2 Lloyd's Rep 130, CA.

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## **(vii) Mistaken Payments, Improvements, Services Rendered and Goods Supplied**

### **30. Mistaken payments.**

The recovery of money paid under a mistake is dealt with in detail elsewhere in this work<sup>1</sup>.

<sup>1</sup> See PARAS 69-77; **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 28-43.

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### **31. Services rendered and goods supplied by mistake.**

Historically, the courts have been less willing to grant relief to a person who rendered services to another by mistake than to a person who paid money by mistake. One reason may be that services, unlike money, cannot be restored<sup>1</sup>. The inquiry focuses on the recipient and what he has done to render himself liable. Thus the general rule is that, where the recipient of services has neither requested them<sup>2</sup> nor freely accepted them<sup>3</sup>, he has no liability to pay for them or for any benefit thereby conferred<sup>4</sup>. In exceptional cases, however, liability has attached, as where the services would have had to be performed by someone if not the claimant<sup>5</sup>, or where (if this is different) the defendant's statutory duty was mistakenly performed by the claimant<sup>6</sup>.

Where goods are supplied by mistake, the matter is complicated by the question of the passing of property. If property does not pass<sup>7</sup>, the supplier has his proprietary remedies<sup>8</sup>. If property does pass, the recipient must pay for them if he requested them<sup>9</sup> or freely accepted them<sup>10</sup>.

<sup>1</sup> *Taylor v Laird* (1856) 25 LJ Ex 329.

<sup>2</sup> Cf *British Steel Corp v Cleveland v Bridge and Engineering Co Ltd* [1984] 1 All ER 504 at 511 per Robert Goff J.

<sup>3</sup> *Munro v Butt* (1858) 8 E & B 738; *Leigh v Dickeson* (1884) 15 QBD 60 at 64-65, CA, per Brett MR; *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234 at 249, CA, per Bowen LJ; *Sumpter v Hedges* [1898] 1 QB 673, CA.

<sup>4</sup> See **RESTITUTION** vol 40(1) (2007 Reissue) PARA 15.

<sup>5</sup> *Craven-Ellis v Canons Ltd* [1936] 2 KB 403, [1936] 2 All ER 1066, CA.

<sup>6</sup> *County of Carleton v City of Ottawa* (1965) 52 DLR (2d) 220.

<sup>7</sup> See PARAS 26-27.

<sup>8</sup> See PARAS 79-80.

<sup>9</sup> *Boulton v Jones* (1857) 2 H & N 564.

10 *Laird v Pim* (1841) 7 M & W 474; *Sumpter v Hedges* [1898] 1 QB 673, CA. See also the Sale of Goods Act 1979 s 30; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 161 et seq.

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### 32. Mistaken improvements to property.

As with services<sup>1</sup>, the general rule is that, in the absence of request or free acceptance a person whose property is mistakenly improved by another is under no liability to pay for that improvement, and neither does the improver acquire any proprietary interest in the property concerned<sup>2</sup>. One general exception to this is the law of maritime salvage<sup>3</sup>. A second, minor exception may be where the true owner of the chattels claims to recover possession from the mistaken improver, and the court awards possession on condition that the improver's expenditure is reimbursed<sup>4</sup>. It seems that, if the chattel gets back into the owner's hands by another route, the improver has no freestanding claim<sup>5</sup>. There is also a third exception, proprietary estoppel<sup>6</sup>.

1 See PARA 31.

2 See *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; and **RESTITUTION** vol 40(1) (2007 Reissue) PARAS 16, 17, 40. See also *Nutt v Read* (1999) 32 HLR 761, (1999) Times 3 December, CA.

3 See *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, CA; and **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 925.

4 See the Torts (Interference with Goods) Act 1977 s 6(1); *Greenwood v Bennett* [1973] QB 195, [1972] 3 All ER 586, CA; and **TORT** vol 45(2) (Reissue) PARA 623 et seq.

5 *Greenwood v Bennett* [1973] QB 195 at 203, [1972] 3 All ER 586 at 589-590, CA, per Lord Denning MR.

6 See PARA 33.

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### 33. Proprietary estoppel.

A third, more important exception to the rule relating to mistaken improvements to property<sup>1</sup> concerns what has come to be known as proprietary estoppel<sup>2</sup>. This doctrine meets the objection to compensating for improvements by looking at what the person whose property has been improved has done to make himself or his property liable to the improver<sup>3</sup>. The doctrine is not confined to the case of improvements, and includes cases where the improver acts to his detriment without benefiting the property owner<sup>4</sup>. So if A positively represents to B that A is not the owner of certain land, and B relies on that representation to his detriment, for example by building over onto it, A is estopped from asserting that A has an interest in the property<sup>5</sup>. Once detriment is shown, the causal link between representation and claim is rebuttably presumed<sup>6</sup>. It is clear that the representation may be one of law rather than fact<sup>7</sup>. As A made a positive

statement, it is irrelevant whether he realised that he had any such interest<sup>8</sup>. So much is clear at law.

However, equity goes further and enforces promises which are relied on, notwithstanding that they may not have been expressly made irrevocable<sup>9</sup>. Thus if A promises B, or creates an expectation in B, that B will have in the future an interest in land, and B to A's knowledge<sup>10</sup> relies on that promise or expectation to his detriment, for example by building on the land<sup>11</sup>, or selling off other land<sup>12</sup>, or spending money on improvements<sup>13</sup>, or devoting his working life to the land in expectation of succeeding to it<sup>14</sup>, equity compels A to perform the promise or make good the expectation<sup>15</sup>, B's detrimental reliance on A's promise having rendered it irrevocable<sup>16</sup>. The mistake in this class of case is not as to the present position, but as to the defendant's future conduct, and is hence not a mistake as conventionally understood<sup>17</sup>. Since the rights enforced are not in contract, but in equity, there is no need to satisfy the formalities required for a contract<sup>18</sup>.

Equity goes even further in some cases where A makes no positive representation or promise. Where A realises that B mistakenly believes that B has rights in A's land (and A knows of his own rights<sup>19</sup>), he comes under a duty to dispel the mistake<sup>20</sup>. If he does not, equity treats him as having made a positive representation, so that if B relies on his own mistaken belief, a similar case of estoppel can be made out as at law, and A is estopped from asserting his interest in the land<sup>21</sup>, at least until the detriment is removed<sup>22</sup>. Moreover, A's duty to speak can arise where A realises that B's mistake is not as to what rights B (or A) currently enjoys, but as to what A has promised him. So if A realises that B mistakenly believes that A has promised an interest in land to B, but does not alert B to his error, equity treats A as having made the promise<sup>23</sup>, and, if B thereafter relies to his detriment on that, equity compels the performance of the promise<sup>24</sup>. These equitable extensions are sometimes referred to as acquiescence<sup>25</sup>, but this term must be distinguished from that used to describe acquiescence which bars an equitable claim generally<sup>26</sup>, as part of the doctrine of laches<sup>27</sup>. The critical feature of this passive form of proprietary estoppel is A's knowledge of B's mistake<sup>28</sup>.

The distinction between relying on a representation and relying on a promise is well established<sup>29</sup>, and traditionally led to different remedies. In the former case the remedy was normally an injunction<sup>30</sup> or a charge for expenditure incurred<sup>31</sup>, but in the latter it was the performance of what was promised<sup>32</sup>. Modern cases, however, hold that the court has a discretion as to the appropriate remedy to satisfy the equity which has been raised<sup>33</sup>, and that the remedy should be proportionate to the detriment incurred<sup>34</sup>. In principle there seems no reason why these rules should apply only to land<sup>35</sup>, but cases applying them to personalty are rare<sup>36</sup>.

There is some debate as to how far (if at all) the doctrine of proprietary estoppel is distinct from that of so-called 'common intention constructive trust'<sup>37</sup>. There are two views: the first (and better) view is that they are derived from a single source and form a single doctrine<sup>38</sup>; the second is that they are two distinct doctrines<sup>39</sup>.

1 See PARA 32.

2 See **ESTOPPEL** vol 16(2) (Reissue) PARA 1089 et seq.

3 *Gregory v Mighell* (1811) 18 Ves 328; *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129; *Sarat Chunder Dey v Gopal Lala* (1892) LR 19 Ind App 203 at 216, PC; *Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA, per Sir Raymond Evershed MR; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA; *Spiro v Lintern* [1973] 3 All ER 319 at 328, [1973] 1 WLR 1002 at 1012, CA, per Buckley LJ; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 147, sub nom *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 912 per Oliver J; *Voyce v Voyce* (1991) 62 P & CR 290, CA; *West Middlesex Golf Club Ltd v Ealing London Borough Council* (1993) 68 P & CR 461; *Gillett v Holt* [2001] Ch 210 at 225-227, [2000] 2 All ER

289 at 301-303, [2000] 2 FLR 266 at 279-281, CA, per Robert Walker LJ; *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945, [2009] 2 P & CR 269.

4 *Davies v Sear* (1869) LR 7 Eq 427; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179.

5 *Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223-224, CA, per Sir Raymond Evershed MR.

6 *Greasley v Cooke* [1980] 3 All ER 710 at 713-715, [1980] 1 WLR 1306 at 1311-1314, CA, per Lord Denning MR; *Wayling v Jones* (1993) 69 P & CR 170, [1995] 2 FLR 1029, CA; *Durant v Heritage* [1994] EGCS 134.

7 *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 148, sub nom *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 913 per Oliver J; *West Middlesex Golf Club Ltd v Ealing London Borough Council* (1993) 68 P & CR 461 at 482 per Roger Kaye QC; *Godfrey v Lees* [1995] EMLR 307. See also *Brennan v Bolt Burdon (a firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] 3 WLR 1321, at [18] per Maurice Kay LJ.

8 *Sarat Chunder Dey v Gopal Lala* (1892) LR 19 Ind App 203 at 216, PC; *Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA, per Sir Raymond Evershed MR; *Spiro v Lintern* [1973] 3 All ER 319 at 328, [1973] 1 WLR 1002 at 1012, CA, per Buckley LJ; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 147, sub nom *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 912 per Oliver J; *West Middlesex Golf Club Ltd v Ealing London Borough Council* (1993) 68 P & CR 461.

9 *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210 at 227-230, [2000] 2 All ER 289 at 303-305, [2000] 2 FLR 266 at 281-284, CA, per Robert Walker LJ (disapproving *Taylor v Dickens* [1998] 3 FCR 455, [1998] 1 FLR 806).

10 *Gillett v Holt* [1998] 3 All ER 917 at 930 (revsd on other grounds [2001] Ch 210, [2000] 2 All ER 289, [2000] 2 FLR 266, CA).

11 *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA.

12 *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA.

13 *Gregory v Mighell* (1811) 18 Ves 328; *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 170 per Lord Kingsdown; *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA; *Voyce v Voyce* (1991) 62 P & CR 290, CA.

14 *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, [2000] 2 FLR 266, CA; *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945, [2009] 2 P & CR 269.

15 See *Actionstrength Ltd v International Glass Engineering IN GL EN SpA* [2003] UKHL 17 at [19]-[29], [2003] 2 AC 541 at [19]-[29] per Lord Hoffmann, and at [47]-[54] per Lord Walker; and see further **ESTOPPEL** vol 16(2) (Reissue) PARA 1091.

16 *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, [2000] 2 FLR 266, CA; *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945, [2009] 2 P & CR 269. Cf *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713, [2009] 1 All ER (Comm) 205 (promise binding in honour only not to be relied upon).

17 See *Holiday Inns Inc v Broadhead* (1974) 232 EG 951 at 1087; *Griffiths v Williams* (1977) 248 Estates Gazette 947 at 949, CA.

18 *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA (constructive trust); *Actionstrength Ltd v International Glass Engineering IN GL EN SpA* [2003] UKHL 17, [2003] 2 AC 541, at [47] per Lord Walker of Gestingthorpe.

19 *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384 at 396, [1959] 2 All ER 651 at 656, CA, per Lord Evershed MR; *Ward v Kirkland* [1967] Ch 194 at 240 per Ungood-Thomas J.

20 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 140-141 per Lord Cranworth LC; *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.



- 21 *Dann v Spurrier* (1802) 7 Ves 231 at 235-236 per Eldon LC; *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 140-141 per Lord Cranworth LC; *Davies v Sear* (1869) LR 7 Eq 427; *A-G to Prince of Wales v Collom* [1916] 2 KB 193.
- 22 See eg *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610.
- 23 *Spiro v Lintern* [1973] 3 All ER 319, [1973] 1 WLR 1002, CA.
- 24 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129.
- 25 *Willmott v Barber* (1880) 15 ChD 96; *Pinfield v Eagles* [2005] EWHC 477 (Ch), [2005] All ER (D) 14 (Apr) (company shares); *Lancashire Mortgage Corp'n Ltd v Scottish & Newcastle plc* [2007] EWCA Civ 684, [2007] All ER (D) 68 (Jul) (mortgage). See also *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117 at 124 per Lord Cottenham LC.
- 26 See eg *De Bussche v Alt* (1878) 8 ChD 286, CA; *Glasson v Fuller* [1922] SASR 148; *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA.
- 27 See PARA 49.
- 28 *Willmott v Barber* (1880) 15 ChD 96 at 105 per Fry J; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 147, sub nom *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 at 912 per Oliver J; *Brinnand v Ewens* (1987) 19 HLR 415 at 418, CA, per Nourse J.
- 29 See *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1982] QB 84 at 103, [1981] 1 All ER 923 at 935 per Robert Goff J; affd [1982] QB 84, [1981] 3 All ER 577, CA.
- 30 *Davies v Sear* (1869) LR 7 Eq 427.
- 31 *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610; *Mayes v Mayes* (1969) 210 Estates Gazette 935.
- 32 *Dillwyn v Llewellyn* (1862) 4 De GF & J 517; *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 170 per Lord Kingsdown; *Chalmers v Pardoe* [1963] 3 All ER 552 at 555, [1963] 1 WLR 677 at 681-682, PC; *ER Ives Investment Ltd v High* [1967] 2 QB 379 at 394-395, [1967] 1 All ER 504 at 507-508, CA, per Lord Denning MR; *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865; *Shaiba v Kindlane Ltd* (22 June 1982, unreported), ChD; *Watson v Goldsborough* [1986] 1 EGLR 265, CA; *Voyce v Voyce* (1991) 62 P & CR 290, CA.
- 33 *Crabb v Arun District Council* [1976] Ch 179 at 198, [1975] 3 All ER 865 at 880, CA, per Scarman LJ; *Pascoe v Turner* [1979] 2 All ER 945 at 950, [1979] 1 WLR 431 at 437-438, CA, per Cumming-Bruce LJ; *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513 at 540, Aust HC, per Brennan J; *Burrows v Sharpe* (1989) 23 HLR 82 at 92, CA, per Dillon LJ; *Baker v Baker* (1993) 25 HLR 408 at 418, CA, per Beldam LJ; *Sledmore v Dalby* (1996) 72 P & CR 196 at 204, CA, per Roch LJ; *Bawden v Bawden* (7 November 1997, unreported), CA; *Habermann v Koehler* (1997) 73 P & CR 515 at 522, CA, per Peter Gibson LJ.
- 34 *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, [2000] 2 FLR 266, CA; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501; *Campbell v Griffin* [2001] EWCA Civ 990, 82 P & CR D43, [2001] NPC 102. See also *Wormall v Wormall* [2004] EWCA Civ 1643, [2005] 05 LS Gaz R 28, [2004] All ER (D) 398 (Nov) (monetary compensation on top of order satisfying equity wrong in principle).
- 35 *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR (on appeal [1977] AC 890, [1976] 2 All ER 641, HL); *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 218, CA, per Megaw LJ; *Re Basham* [1987] 1 All ER 405 at 413-414, [1986] 1 WLR 1498 at 1508 per Edward Nugee QC.
- 36 *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610 (insurance premiums); *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, [1957] 2 All ER 525, CA (hire purchase of car); *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, [2000] 2 FLR 266, CA (bulk of residuary estate); *Pinfield v Eagles* [2005] EWHC 477 (Ch), [2005] All ER (D) 14 (Apr) (company shares).
- 37 See eg *Gissing v Gissing* [1971] AC 886, [1970] 2 All ER 780, HL.
- 38 *Grant v Edwards* [1986] Ch 638 at 656-657, [1986] 2 All ER 426 at 439, per Browne-Wilkinson V-C; *Yaxley v Gotts* [2000] Ch 162 at 176-177, [2000] 1 All ER 711 at 721-722, per Robert Walker LJ; *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211, [2004] 3 All ER 703, at [66] per Chadwick LJ. See also *Q v Q* [2008] EWHC 1874 (Fam), 11 ITELR 748, [2009] 1 FLR 935, at [112] per Black J.

39 *Hyett v Stanley* [2003] EWCA Civ 942, [2003] 3 FCR 253, [2004] 1 FLR 394, at [26]-[28] per Sir Martin Nourse. See also *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, [2007] 2 All ER 929, at [37] per Lord Walker; *Powell v Benney* [2007] EWCA Civ 1283, [2008] 1 P & CR D31, [2007] All ER (D) 71 (Dec), at [24] per Sir Peter Gibson.

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## (4) THIRD PARTY DETERMINATIONS

### 34. Third party determinations.

Where parties to a contract agree that something (whether price, value or otherwise) should be determined by an independent person acting as agent, whose determination is to be conclusive, in the absence of fraud, collusion, or manifest or material error<sup>1</sup>, they are bound by that determination because they have so agreed<sup>2</sup>. In itself it is irrelevant whether the determination gives reasons or not<sup>3</sup>. What matters is whether it is possible to say from all the evidence properly before the court what the expert has done and why<sup>4</sup>. And the question then is not whether he is mistaken in the result<sup>5</sup>, but whether he has departed from his instructions in a material way<sup>6</sup>. Any departure is material unless it can truly be characterised as trivial in the sense that it could make no possible difference to either party<sup>7</sup>, or if it is such a departure as the parties would reasonably have regarded as being sufficient to invalidate the determination<sup>8</sup>; and if material departure can be shown, then the determination can be challenged<sup>9</sup>. If material departure cannot be shown, then, in the absence of manifest or material error<sup>10</sup>, the determination is binding<sup>11</sup>. The same principles apply to the decision of an expert as to which other expert should be appointed to determine the substantive question<sup>12</sup>.

In seeking, in a non-speaking valuation, to discern the expert's reasons for his decision, no encouragement will be given to any attempt to infer what is happening behind the curtain<sup>13</sup>. But the expert's decision-making authority does not ordinarily extend to questions of law such as the meaning of a contract or lease, and so if it is clear from the determination that the expert has decided such a question wrongly as a matter of law he must have gone outside that authority<sup>14</sup>.

The rules of natural justice do not apply to an expert determination, whether by virtue of the Human Rights Act 1998 or otherwise<sup>15</sup>.

1 See note 10.

2 *Campbell v Edwards* [1976] 1 All ER 785 at 788, [1976] 1 WLR 403 at 407, CA, per Geoffrey Lane LJ; *Baber v Kenwood Manufacturing Co Ltd* [1978] 1 Lloyd's Rep 175, CA; *Shell UK Ltd v Enterprise Oil plc* [1999] 2 All ER (Comm) 87, [1999] 2 Lloyd's Rep 456; *Soules CAF v Louis Dreyfus Negoce SA* [2000] 2 All ER (Comm) 154, [2000] 2 Lloyd's Rep 307; *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703, [2002] 1 Lloyd's Rep 295, CA; *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1, [2008] 1 P & CR 436, [2008] All ER (D) 18 (Jan); and see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 295; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 314.

3 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 177, [1992] 1 WLR 277 at 284, CA, per Dillon LJ. See also *Invensys plc v Automotive Sealing Systems Ltd* [2002] 1 All ER (Comm) 222 (where reasons are given, a court should consider those reasons when determining whether there was an error in the determination).

4 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 177, [1992] 1 WLR 277 at 284, CA, per Dillon LJ.

- 5 See eg *Jones v Jones* [1971] 2 All ER 676, [1971] 1 WLR 840.
- 6 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170 at 179, [1992] 1 WLR 277 at 287, CA, per Dillon LJ; cf *Dean v Prince* [1954] Ch 409, [1954] 2 All ER 749, CA.
- 7 *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832 at [26], [2002] 1 All ER 703 at [26], [2002] 1 Lloyd's Rep 295 at [26] per Simon Brown LJ.
- 8 *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832 at [47], [2002] 1 All ER 703 at [47], [2002] 1 Lloyd's Rep 295 at [47] per Dyson LJ.
- 9 *Macro v Thompson (No 2)* [1997] 1 BCLC 626, [1996] BCC 707, CA; *Shell UK Ltd v Enterprise Oil plc* [1999] 2 All ER (Comm) 87, [1999] 2 Lloyd's Rep 456; *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703, [2002] 1 Lloyd's Rep 295. Even if the expert holds a public office, this does not mean that the challenge must be by way of judicial review: see *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575, [1996] 1 WLR 48, HL; and **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS** vol 4(3) (Reissue) PARA 295.
- 10 'Manifest or material error' may comprise 'oversights and blunders so obvious as to admit of no difference of opinion' (*Healds Foods Ltd v Hyde Dairies Ltd* (1 December 1994, unreported), QBD, per Potter J (affd on appeal 6 December 1996, unreported, CA); *Conoco (UK) Ltd v Phillips Petroleum Co (UK) Ltd* (19 August 1996, unreported) per Morison J; *Dixons Group plc v Murray-Oboynski* (1997) 86 BLR 16) or 'oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion' (*Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832 at [33], [2002] 1 All ER 703 at [33], [2002] 1 Lloyd's Rep 295 at [33] per Simon Brown LJ).
- 11 *Jones v Sherwood Computer Services plc* [1992] 2 All ER 170, [1992] 1 WLR 277; *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103, [1991] 28 EG 86; *Pontsarn Investments v Kansallis-Osake-Pankki* [1992] 1 EGLR 148, [1992] 22 EG 103; *Dixons Group plc v Murray-Oboynski* (1997) 86 BLR 16; *Shell UK Ltd v Enterprise Oil plc* [1999] 2 All ER (Comm) 87, [1999] 2 Lloyd's Rep 456; *Veba Oil Supply and Trading GmbH v Petrotrade Inc* [2001] EWCA Civ 1832, [2002] 1 All ER 703, [2002] 1 Lloyd's Rep 295.
- 12 *Epoch Properties Ltd v British Home Stores (Jersey) Ltd* [2004] JLR 306, [2004] 3 EGLR 34, Jersey CA.
- 13 *Morgan Sindall plc v Sawstons Farms (Cambs) Ltd* [1999] 1 EGLR 90, [1999] 07 EG 135, CA; *Doughty Hanson & Co Ltd v Roe* [2007] EWHC 2212 (Ch), [2008] 1 BCLC 404, [2007] All ER (D) 56 (Oct).
- 14 *National Grid Co plc v M25 Group Ltd* [1999] 1 EGLR 65, [1999] 08 EG 169, CA; *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1, [2008] 1 P & CR 436, [2008] All ER (D) 18 (Jan); *Menolly Investments 3 Sarl v Cerep Sarl* [2009] EWHC 516 (Ch), 125 ConLR 75, [2009] All ER (D) 238 (Mar).
- 15 *Owen Pell Ltd v Bindi (London) Ltd* [2008] EWHC 1420 (TCC), [2008] BLR 436. As to the principles of natural justice generally see **JUDICIAL REVIEW** vol 61 (2010) PARAS 629-630.

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## **(5) MISTAKE IN THE EXPRESSION OF INTENTION**

### **35. Instrument in terms contrary to intention.**

Where the intention of the parties to an otherwise valid transaction is recorded in terms which do not accurately reflect that intention, the court may correct the mistake in the record in order to give effect to the intention. Where the transaction is a unilateral one (for example, a deed poll<sup>1</sup> or a will<sup>2</sup>), the intention concerned is that of the maker alone<sup>3</sup>. Where it is a bilateral or multilateral transaction, in order for the court to correct the document, the intention that must be inaccurately recorded is the common intention of the parties to it<sup>4</sup>.

However, the common intention concerned is not necessarily the genuine intention of all parties; the doctrine of estoppel has a role to play<sup>5</sup>. Thus the court may intervene where one

party mistakenly believes that the document records his intention, and the other party realises the mistake but says nothing<sup>6</sup>. On the other hand, if the other party does not realise the first party's mistake, the court will not assist<sup>7</sup>. It does not matter whether the mistake involved is one of fact or of law<sup>8</sup>. But it must be proved to a high standard before the court will override what is recorded<sup>9</sup>.

The court intervenes in these cases in two main ways: (1) applying the rules of construction to interpret the faulty document in the intended sense<sup>10</sup>; and (2) rectifying the document so as to make it accord with the intended transaction<sup>11</sup>. Usually these are alternatives, in that, if the true meaning appears on construction there is nothing to rectify, even if sometimes it is unclear which is the appropriate remedy<sup>12</sup>. But rectification may sometimes be granted notwithstanding that the true meaning can be ascertained by construction<sup>13</sup>.

There is nothing to prevent a party to the same claim seeking rectification of an agreement and specific performance of the agreement as rectified<sup>14</sup>.

1 See PARA 65.

2 See PARA 64.

3 See PARA 57.

4 See PARA 57.

5 See PARA 28.

6 See eg *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545 (action for rectification allowed).

7 See eg *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA (action for rescission unsuccessful); *George Wimpey UK Ltd v VIC Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135, (2005) Times, 16 Feb (action for rectification unsuccessful).

8 See PARA 61.

9 See PARA 61.

10 See PARAS 36-37.

11 See PARAS 57-68.

12 *Cowen v Truefitt* [1899] 2 Ch 309, CA.

13 *Standard Portland Cement Co Pty Ltd v Good* (1982) 47 ALR 107, PC.

14 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC; *Dundee Farm Ltd v Bambury Holdings* [1978] 1 NZLR 647, CA. As to specific performance generally see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 801 et seq.

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### **36. Correction of errors by application of rules of construction: *inter vivos*.**

The meaning which a document would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of the document is what the parties using the words against the relevant background would reasonably have been understood to mean<sup>1</sup>. The object of the interpretation of a written instrument is to discover the intention of the parties as

appearing from the whole of its contents, construed against the relevant background, and it follows that that intention must not be defeated by too strict an adherence to the actual words used and that any corrections may be made which appear necessary from a consideration of the whole instrument<sup>2</sup>. Thus if it is clear on the face of the instrument itself that words have been omitted or inserted by mistake or inadvertence, the words so omitted or inserted will be supplied or struck out by the court as a matter of construction for the purpose of giving effect to the whole of the document<sup>3</sup>. Where words are meaningless in the particular context in which they are used the court as a matter of construction may ignore them<sup>4</sup>. The court will even disregard a word or phrase in an Act of Parliament if no sensible meaning can be given to it<sup>5</sup>. General words in a compromise agreement giving up 'all or any claims . . . that exist or may exist' will not be construed as extending to claims of which the party could have had no knowledge<sup>6</sup>.

Similarly, if there is a manifest absurdity<sup>7</sup> or clerical error in a document<sup>8</sup> or an obvious mistake as to date<sup>9</sup>, or as to name<sup>10</sup>, the court will treat it as rectified, and where property is settled subject to a mortgage the amount of which is incorrectly stated in the settlement, the error being clearly proved as between parties to the settlement, the court may treat the settlement as if the correct amount has been stated in it without putting the parties to the formality of a suit to rectify the error<sup>11</sup>. Again, as regards covenants, however general the words may be if standing alone, if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words<sup>12</sup>.

The relevant background against which the document is construed includes all the knowledge which would reasonably be available to the parties in the situation in which they were at the time of the transaction<sup>13</sup>, but excluding the previous negotiations of the parties and their declarations of subjective intent<sup>14</sup>. Such negotiations and declarations are available only in a claim for rectification<sup>15</sup>. The relevant background may not only enable the reasonable man to choose between ambiguous meanings of words in the document, but also to conclude that the parties have used the wrong words or syntax<sup>16</sup>.

1 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [2009] 4 All ER 677; *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann; *Bromarin AB v IMD Investments Ltd* [1998] STC 244.

2 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

3 See eg *Kirk v Unwin* (1851) 6 Exch 908; *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305 at 320, [1969] 2 All ER 988 at 995, CA, per Salmon LJ (affd on different grounds [1971] AC 958, [1970] 2 All ER 216, HL); *Homburg Houtimport BV v Agrosin Private Ltd, The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [2003] 2 All ER 785, at [23] per Lord Bingham of Cornhill, and at [192] per Lord Millett; *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P & CR 187, [2007] All ER (D) 245 (Apr).

4 *Nicolene Ltd v Simmonds* [1953] 1 QB 543, [1953] 1 All ER 822, CA; *Michael Richards Properties Ltd v Corp'n of Wardens of St Saviours' Parish, Southwark* [1975] 3 All ER 416.

5 *Stone v Yeovil Corp'n* (1876) 1 CPD 691 at 701 per Brett J and at 705 per Archibald J; on appeal (1876) 2 CPD 99, CA.

6 *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, [2001] 1 All ER 961 at [9]-[10] per Lord Bingham of Cornhill.

7 *Fitzgerald v Masters* (1956) 95 CLR 420 at 426-427; *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305 at 314, [1969] 2 All ER 988 at 990-991, CA, per Lord Denning MR (affd on different grounds [1971] AC 958, [1970] 2 All ER 216, HL); *Watson v Phipps* (1985) 60 ALJR 1, PC.

8 *Simpson v Vaughan* (1739) 2 Atk 31; *Burchell v Clark* (1876) 2 CPD 88, CA; *Mourand v Le Clair* [1903] 2 KB 216, DC; *Matthews v Smallwood* [1910] 1 Ch 777; *Elliott v Freeman* (1863) 7 LT 715; *Re De La Touche's Settlement* (1870) LR 10 Eq 599; *John Orr Ewing & Co v John Orr Ewing* (1882) 8 App Cas 822, HL; *Re Ottleys' Estate* [1910] 1 IR 1; *Re Alexander's Settlement, Jennings v Alexander* [1910] 2 Ch 225; *Stedman v Collett*

(1854) 17 Beav 608; *Admasatos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133, [1958] 1 All ER 725, HL; *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733; *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953, 212 Estates Gazette 159; cf *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA; *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 3 All ER 902 at 915, [1973] 1 WLR 1572 at 1585 per Megarry J; *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633, CA.

9 *Fitch v Jones* (1855) 5 E & B 238; *Hollingsworth v White* (1862) 10 WR 619; *Lamb v Bruce* (1876) 45 LJQB 538, DC; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL.

10 *Wilson v Wilson* (1854) 5 HL Cas 40 at 52 per Lord Cranworth LC; *Breslauer v Barwick* (1876) 36 LT 52; *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733.

11 *Scholefield v Lockwood (No 2)* (1863) 32 Beav 436 at 438 per Sir John Romilly MR (affd 4 De GJ & Sm 22); *Annesley v Annesley* (1893) 31 LR Ir 457 at 463.

12 *Hesse v Stevenson* (1803) 3 Bos & P 565 at 575 per Alvanley CJ; *Burchell v Clark* (1876) 2 CPD 88 at 94, CA, per Cockburn CJ; *Baumwoll Manufactur Von Carl Scheibler v Furness* [1893] AC 8 at 15-16, HL, per Lord Herschell LC; *Gwyn v Neath Canal Navigation Co* (1868) LR 3 Exch 209 at 215 per Kelly CB.

13 See *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P & CR 187, [2007] All ER (D) 245 (Apr) (an agreement which included the form and content of a draft lease, was an important part of the background and a permissible aid in the construction of the lease in its final form).

14 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [2009] 4 All ER 677; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 114, [1998] 1 WLR 896 at 912-913, HL, per Lord Hoffmann; *JIS (1974) Ltd v MCE Investment Nominees Ltd* [2003] EWCA Civ 721, [2003] 24 LS Gaz R 36, [2003] All ER (D) 155 (Apr), at [15] per Carnwath LJ.

15 As to rectification see PARAS 57-68. Lord Nicholls of Birkenhead has observed, extra-judicially, that this is why an action for construction is commonly combined with a claim for rectification, with supporting evidence: see the Chancery Bar Association Annual Lecture 2005.

16 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Investors' Compensation Scheme Ltd v Hopkin & Sons*, *Alford v West Bromwich Building Society*, *Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913, HL, per Lord Hoffmann.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/2. LEGAL CONSEQUENCES AND CLASSIFICATION OF MISTAKE/(5) MISTAKE IN THE EXPRESSION OF INTENTION/37. Correction of errors by application of rules of construction: wills.

### 37. Correction of errors by application of rules of construction: wills.

The rules for the construction of wills are in many respects different from those relating to the construction of inter vivos documents. In general, the courts have less power to correct an error by applying the construction rules. Nonetheless, the court may in some cases read a will as if words in it were omitted or changed<sup>1</sup>, or as if words not in it were supplied<sup>2</sup>, where this is necessary to give effect to the testator's overriding intention, collected from the context in the will<sup>3</sup>. In these cases, in effect, the spirit is strong enough to overcome the letter<sup>4</sup>.

When it comes to the question of admissibility of evidence for the purpose of proving a mistake, the rules are even less liberal<sup>5</sup>. Once probate has been granted, it is not permissible to look at the original will in order to correct alleged errors in the probate copy<sup>6</sup>, though it can be looked at for the purpose of construction generally<sup>7</sup>. Nor is extrinsic evidence admissible to show that words have been inserted in or omitted from the will by mistake<sup>8</sup>. It is, however, provided by statute that both direct and circumstantial extrinsic evidence of the testator's intention is admissible to assist in the interpretation of the will in so far as: (1) any part of the will is meaningless; (2) the language used is ambiguous on the face of it; or (3) evidence, other than of the testator's intention, shows that language used is ambiguous in the light of

surrounding circumstances<sup>9</sup>. However, such evidence can never make words in a will bear a meaning which they are incapable of meaning<sup>10</sup>.

1 *Hart v Tulk* (1852) 2 De GM & G 300; *Re Sumner's Will Trusts, Midland Bank Executor and Trustee Co Ltd v Sumner* [1969] 1 All ER 779, [1969] 1 WLR 373.

2 *Greenwood v Greenwood* (1877) 5 ChD 954, CA; *Re Haygarth, Wickham v Haygarth* [1913] 2 Ch 9; *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713.

3 Jarman on Wills (8th Edn, 1951) p 592; *Re Smith, Veasey v Smith* [1948] Ch 49, [1947] 2 All ER 708; *Re Whitrick, Sutcliffe v Sutcliffe* [1957] 2 All ER 467 at 469, [1957] 1 WLR 884 at 887, CA, per Jenkins LJ; and see **WILLS** vol 50 (2005 Reissue) PARA 408.

4 *Key v Key* (1853) 4 De GM & G 73 at 84-85, CA, per Knight-Bruce LJ; *Re Doland's Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713.

5 See **WILLS** vol 50 (2005 Reissue) PARA 408.

6 *Bernal v Bernal* (1838) 3 My & Cr 559 at 563n; *Oppenheim v Henry* (1853) 9 Hare 802n; *Gann v Gregory* (1854) 3 De GM & G 777; *Re Cliff's Trusts* [1892] 2 Ch 229.

7 *Re Harrison, Turner v Hellard* (1885) 30 ChD 390, CA; *Houston v Burns* [1918] AC 337, HL; *Re Battie-Wrightson, Cecil v Battie-Wrightson* [1920] 2 Ch 330; *Re Jeffrey, Welch v Jeffrey* [1948] 2 All ER 131; *Re Steel, Public Trustee Ltd v Christian Aid Society* [1979] Ch 218, [1978] 2 All ER 1026.

8 *Langston v Langston* (1834) 2 Cl & Fin 194 at 240, HL, per Lord Lyndhurst LC; *Re Bywater, Bywater v Clarke* (1881) 18 ChD 17, CA; *Re Carlisle, Belfast Bank Executor and Trustee Co v Patterson* [1950] NI 105 at 112-113 per Black LJ.

9 See the Administration of Justice Act 1982 s 21(1), (2); and **WILLS** vol 50 (2005 Reissue) PARA 483 et seq. Prior to the enactment of the Administration of Justice Act 1982, direct extrinsic evidence of the testator's intention was not admissible to prove a mistake (*Doe & Hiscocks v Hiscocks* (1839) 5 M & W 363; *Drake v Drake* (1860) 8 HL Cas 172; *Charter v Charter* (1874) LR 7 HL 364) unless there was an equivocation, or latent ambiguity (*Re Hubbuck* [1905] P 129; *Reynolds v Whelan* (1847) 16 LJ Ch 434).

10 *Re Williams, Wiles v Madgin* [1985] 1 All ER 964 at 970, [1985] 1 WLR 905 at 912 per Nicholls J.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/38. Classification of kinds of relief.

### 3. REMEDIES

#### (1) IN GENERAL

##### (i) Introduction

##### 38. Classification of kinds of relief.

The relief to be granted in case of mistake may be:

- 14 (1) application of the rules of construction of documents<sup>1</sup>;
- 15 (2) refusal of specific performance or of damages for breach of contract<sup>2</sup>;
- 16 (3) rescission<sup>3</sup>;
- 17 (4) rectification<sup>4</sup>;
- 18 (5) recovery of money paid under mistake<sup>5</sup>;
- 19 (6) recovery of property transferred under mistake<sup>6</sup>; or
- 20 (7) reopening of settled accounts<sup>7</sup>.

In addition to these remedies, a mistaken party may be able to plead the mistake as a defence to a claim on a contract, by showing that, as a result, there was no contract<sup>8</sup>, or that he is relieved of liability to perform under it<sup>9</sup>. Such a party may also be able in an appropriate case to seek a declaration of non-liability<sup>10</sup>.

The principles of agency have no part to play in the court's approach to the just correction of mistakes in legal transactions<sup>11</sup>.

1 See PARAS 36-37.

2 See PARA 51.

3 See PARAS 52-56.

4 See PARAS 57-68.

5 See PARAS 69-77.

6 See PARAS 79-80.

7 See PARA 78.

8 See PARAS 12-18.

9 See PARAS 20, 22.

10 *Société Maritime et Commerciale v Venus Steam Shipping Co Ltd* (1904) 9 Com Cas 289.

11 See *Secured Residential Funding plc v Douglas Goldberg Hendeles & Co* (2000) Times, 26 April, CA, [2000] All ER (D) 578.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/39. Proof required before relief will be granted.

### **39. Proof required before relief will be granted.**

In order to obtain relief on the ground of mistake, the party seeking it must prove that his conduct has been determined by the mistake<sup>1</sup>. If his conduct would have been the same even if he had not made the mistake, then he is not entitled to relief<sup>2</sup>; nor, even if his conduct has been induced by the mistake, is he entitled to relief if the mistake merely affected his motives and was not fundamental to the transaction<sup>3</sup>.

1 *Carpmael v Powis* (1846) 10 Beav 36 at 43 per Lord Langdale MR (mistake of fact); *Stone v Godfrey* (1854) 5 De GM & G 76 (mistake of law); *Trigge v Lavallee* (1863) 15 Moo PCC 270 at 298 per Lord Langdale MR (mistake of both law and fact); *Bernard & Shaw Ltd v Shaw* [1951] 2 All ER 267; *United Overseas Bank v Jiwani* [1977] 1 All ER 733 at 737, [1976] 1 WLR 964 at 968 per Mackenna J; *North Western Gas Board v Manchester Corp'n* (1963) 61 LGR 241 at 250 per Megaw J (revsd on another point [1963] 3 All ER 422, [1964] 1 WLR 64, CA). As to the abolition of the distinction between mistake of law and mistake of fact see PARA 11.

2 *Holt v Markham* [1923] 1 KB 504 at 515, CA, per Scrutton LJ; *Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd* (1928) 45 TLR 134; *Robert A Munro & Co v Meyer* [1930] 2 KB 312; *United Overseas Bank v Jiwani* [1977] 1 All ER 733 at 737, [1976] 1 WLR 964 at 968-969 per Mackenna J; *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 4 All ER 1072, [2004] 1 WLR 1784, at [60] per Potter LJ.

3 *Wilson v Thornbury* (1875) 10 Ch App 239 at 249 per James LJ; *Bell v Lever Bros Ltd* [1932] AC 161, HL; *Norwich Union Fire Insurance Society Ltd v William H Price Ltd* [1934] AC 455, PC; *Morgan v Ashcroft* [1938] 1



KB 49, [1937] 3 All ER 92, CA; *Schonekess v Bach* (1968) 62 WWR 673, 66 DLR (2d) 415; *Bligh v Martin* [1968] 1 All ER 1157 at 1162, [1968] 1 WLR 804 at 814 per Pennycuik J.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/40. Instances where relief will be granted.

#### 40. Instances where relief will be granted.

The court will grant relief when the mistake was due to ignorance<sup>1</sup>, notwithstanding that the party alleging the mistake had the means of knowing the facts<sup>2</sup>. The court will also grant relief when the mistake was due to misconception<sup>3</sup>, and in some cases when it was due to forgetfulness<sup>4</sup>.

1 *Cocking v Pratt* (1750) 1 Ves Sen 400; *East India Co v Donald* (1804) 9 Ves 275; *Hore v Becher* (1842) 12 Sim 465; *Bell v Gardiner* (1842) 4 Man & G 11; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 369, 374.

2 *Kelly v Solari* (1841) 9 M & W 54; *Bell v Gardiner* (1842) 4 Man & G 11; *Brownlie v Campbell* (1880) 5 App Cas 925 at 952, HL, per Lord Hatherley; *Wilmott v Barber* (1880) 15 ChD 96; *Re Chaplin, Milne, Grenfell & Co Ltd* (1914) 31 TLR 279; cf *New Brunswick and Canada Rly and Land Co v Conybeare* (1862) 9 HL Cas 711 at 742, HL, per Lord Chelmsford; *Secretary of State for Employment v Wellworthy (No 2)* [1976] ICR 13.

3 *Strickland v Turner* (1852) 7 Exch 208; *Colyer v Clay* (1843) 7 Beav 188; *Cochrane v Willis* (1865) 1 Ch App 58; *Scott v Coulson* [1903] 2 Ch 249, CA; *Harryman v Collins* (1854) 18 Beav 11; *Concoran v Wade* [1913] 1 IR 25.

4 *Kelly v Solari* (1841) 9 M & W 54; *Lucas v Worswick* (1833) 1 Mood & R 293; *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476; and see *Baker v Courage & Co* [1910] 1 KB 56 at 65 per Hamilton J; cf *Barrow v Isaacs & Son* [1891] 1 QB 417, CA; *Eastern Telegraph Co Ltd v Dent* [1899] 1 QB 835, CA (where relief was refused); *Samuel Properties (Developments) Ltd v Hayek* [1972] 3 All ER 473, [1972] 1 WLR 1296, CA.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/41. Instances where relief will not be granted.

#### 41. Instances where relief will not be granted.

In the following cases the court will not intervene, despite the mistake:

- 21 (1) where, although the parties are not in fact *ad idem*<sup>1</sup>, there is a consensus by estoppel which is accurately recorded in any document<sup>2</sup>;
- 22 (2) where, although there is a common mistake, the parties' agreement (accurately recorded) on its true construction so allocates the risk that either or both is or are not excused from performance in the circumstances<sup>3</sup>;
- 23 (3) where, although there is a mistake against which the court would in principle relieve by rescission or rectification<sup>4</sup>, a third party has acquired legal or (possibly) equitable rights in the subject matter of the transaction<sup>5</sup>;
- 24 (4) where it is impossible to restore the parties substantially to their original position<sup>6</sup>;
- 25 (5) where an applicable limitation period has expired or the claimant is guilty of laches<sup>7</sup>;
- 26 (6) where the claimant has acquiesced in the mistake for a long period<sup>8</sup> with knowledge of the relevant facts<sup>9</sup>, or has positively affirmed the transaction, for

example by taking a benefit under it<sup>10</sup> with knowledge of the facts and relevant law<sup>11</sup>;

- 27 (7) where a document might have been rectified, but a judgment founded on a particular construction of that document has been given and satisfied<sup>12</sup>.

The fact that an agreement for sale or lease of land has been carried into execution by conveyance is not of itself a bar to rescission if this is otherwise justified<sup>13</sup>. And where a surveyor, employed by tenants in common to partition between them the land held in common, by mistake allotted to one less than his proportionate share of the land, and the mistake was not discovered until some of the land had been sold, that one was held entitled to receive compensation from the other co-owners, since a new partition was now no longer possible<sup>14</sup>.

1 le of the same mind.

2 See PARA 35.

3 See PARAS 21-22.

4 As to rescission see PARA 52 et seq. As to rectification see PARA 57 et seq.

5 See PARA 42.

6 See PARA 43.

7 See PARA 49.

8 *Rogers v Ingham* (1876) 3 ChD 351 at 357, CA, per Mellish LJ; *Re Hulkes, Powell v Hulkes* (1886) 33 ChD 552 at 561 per Chitty J.

9 *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA; *Re Freeston's Charity* [1979] 1 All ER 51 at 62, [1978] 1 WLR 741 at 754, CA, per Goff LJ.

10 See *Clough v London and North Western Rly Co* (1871) LR 7 Exch 26.

11 See *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA.

12 See PARA 50.

13 *Jones v Clifford* (1876) 3 ChD 779; *Debenham v Sawbridge* [1901] 2 Ch 98 at 109 per Byrne J; *Scott v Coulson* [1903] 2 Ch 249, CA; cf *Svanioso v McNamara* (1956) 96 CLR 186 at 198-199; and see **SALE OF LAND** vol 42 (Reissue) PARA 356.

14 *Dacre v Gorges* (1825) 2 Sim & St 454; cf *Teacher v Calder* [1899] AC 451, HL (an account taken on wrong basis due to accountant's mistake; new account ordered).

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/42. Effect of third party rights.

## 42. Effect of third party rights.

The court will not intervene to set aside a transaction or to rectify a document on the ground of mistake as against a third party who has become a purchaser for value of a legal estate or interest without notice<sup>1</sup>. For this purpose, the assignee of a lease who assumes liability for the tenant's covenants and gives an indemnity to him for their due performance is a purchaser for value<sup>2</sup>. On the other hand a claim to rescind or to rectify for mistake is not defeated by a volunteer who acquires a legal (or equitable) interest, even without notice<sup>3</sup>.

The authorities dealing with the case where a third party acquires an equitable interest for value without notice are unsettled. On one side there are cases referring to the right to rescind or to rectify as a 'mere equity' which is said to be defeated by even an equitable purchaser for value<sup>4</sup>. On the other side there are cases treating such rights as interests in the land<sup>5</sup>, which on principle should not be defeated by the purchaser, even without notice, of merely an equitable interest<sup>6</sup>. But the matter is complicated by the fact that the original owner, by handing over deeds or other indicia of title to the other party (who thereafter deals as apparent owner with the third party), may nevertheless be estopped, as against the third party, from asserting his own interest<sup>7</sup>, and, since this principle applies in equity as at law<sup>8</sup>, such estoppels may explain the original authorities<sup>9</sup>.

A member of a company pension scheme who has provided consideration for the benefits thereunder can be a purchaser for value, at least for some purposes<sup>10</sup>. Usually, however, such a person has no expectation of receiving enhanced benefits through a mistake, and gives no additional consideration for such enhancement, and hence cannot claim to be a purchaser for value preventing rectification<sup>11</sup>.

1 *Garrard v Frankel* (1862) 30 Beav 445 at 459-460 per Sir John Romilly MR; *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089. As to purchasers for value without notice see **EQUITY** vol 16(2) (Reissue) PARAS 565-567, 576-583. See also **SALE OF LAND** vol 42 (Reissue) PARA 354.

2 *Harris v Tubb* (1889) 42 ChD 79; *Nurdin & Peacock plc v DB Ramsden & Co* [1999] 1 All ER 941, [1999] 1 WLR 1249.

3 *Load v Green* (1846) 15 M & W 216; *Scholefield v Templer* (1859) 4 De G & J 429, Johns 155; *Re Eastgate* [1905] 1 KB 465; Cf *Re Scottish Petroleum Co* (1883) 23 ChD 413 at 435-439, CA.

4 *Phillips v Phillips* (1861) 4 De GF & J 208; *Ernest v Vivian* (1863) 33 LJCh 513; *Cave v Cave* (1880) 15 ChD 639; *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265.

5 *Stump v Gaby* (1852) 2 De GM & G 623; *Gresley v Mousley* (1859) 4 De G & J 78; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Re Sherman, Re Walters, Trevenen v Pearce* [1954] Ch 653, [1954] 1 All ER 893; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183 at 196, [1981] 3 All ER 392 at 400 per Mervyn Davies J; *Nurdin & Peacock plc v DB Ramsden & Co* [1999] 1 All ER 941, [1999] 1 WLR 1249.

6 *Eyre v Burmester* (1862) 10 HL Cas 90.

7 *Pickard v Sears* (1837) 6 Ad & El 469; *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, [1957] 2 All ER 525, CA; *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR (on appeal [1977] AC 890, [1976] 2 All ER 641, HL).

8 *Ashburner Equity* (2nd Edn, 1933) p 57; *Earl Aldborough v Trye* (1840) 7 Cl & Fin 436 at 463-464, HL, per Lord Cottenham LC; *Rice v Rice* (1854) 2 Drew 73 at 83; *Rimmer v Webster* [1902] 2 Ch 163 at 173-174 per Farwell J.

9 See in particular *Phillips v Phillips* (1861) 4 De GF & J 208 at 217 per Lord Campbell LC; cf *Eyre v Burmester* (1862) 10 HL Cas 90.

10 See *Kerr v British Leyland (Staff) Trustees Ltd* [1986] CA Transcript 286, CA; *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27 at 31, [1991] PLR 225 at 232, CA, per Dillon LJ; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 at 605-606, [1991] 1 WLR 589 at 597, per Browne-Wilkinson V-C; *McDonald v Horn* [1995] 1 All ER 961 at 972-973, [1995] ICR 685 at 695, CA, per Hoffmann LJ.

11 See *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [77]-[79] per Lawrence Collins J; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at [147], [2005] All ER (D) 177 (Jan) at [147] per Etherton J.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(i) Introduction/43. Where restitutio in integrum impossible.

#### 43. Where restitutio in integrum impossible.

Equity will not generally award rescission of a mistaken transaction where it is impossible to restore the parties to substantially their original positions<sup>1</sup>. However, relief will not be denied in a proper case where it is merely difficult to do so<sup>2</sup>. The court may order rescission on the basis of restoring the parties so far as practically possible to do so<sup>3</sup>. For this purpose ancillary relief may be granted, such as an account of profits<sup>4</sup>, or an allowance for work done<sup>5</sup>, or a sum paid for benefits enjoyed<sup>6</sup>. In Australia<sup>7</sup>, but not in England<sup>8</sup>, a transaction may be rescinded pro tanto, that is, to reduce it to a level free from the vitiating factor. It seems that the practicality of making restitution in these cases is to be considered as at the time of judgment<sup>9</sup>.

1 *Blackburn v Smith* (1848) 2 Exch 783; *Re Saxon Life Assurance Society* (1862) 2 John & H 408 (affd 1 De GJ & Sm 29); *Bateman v Boynton* (1866) 1 Ch App 359 at 367 per Turner LJ; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Thorpe v Fasey* [1949] Ch 649, [1949] 2 All ER 393, HL; and see **CONTRACT** vol 9(1) (Reissue) PARA 986.

2 *Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 232 per Lord Chelmsford.

3 *Newbigging v Adam* (1886) 34 ChD 582, CA; *Alati v Kruger* (1955) 94 CLR 216 at 223-224; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

4 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL.

5 *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428, [1985] 3 All ER 351, CA.

6 *Hulton v Hulton* [1917] 1 KB 813 at 826, CA, per Scrutton LJ; *Midland Bank plc v Greene* [1994] 2 FLR 827, (1993) 27 HLR 350.

7 *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

8 *TSB Bank plc v Camfield* [1995] 1 All ER 951, [1995] 1 WLR 430, CA; but cf *Barclays Bank plc v Caplan* [1998] 1 FLR 532, 78 P & CR 153.

9 See Meagher, Gummow and Lehane *Equity--Doctrines and Remedies* (4th Edn, 2002) para 24-085, and the cases there cited.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(ii) Evidence on which Relief will be Granted/44. Position at common law.

## **(ii) Evidence on which Relief will be Granted**

### **44. Position at common law.**

At common law, oral evidence is not in general admissible to show that a written contract, interpreted according to the ordinary rules of construction, does not express the true and complete intention of the parties<sup>1</sup>. So, at common law, if an agreement is ambiguous, oral evidence as to the intention of the parties with a view to showing that some term or word has been inserted or omitted by mistake is inadmissible<sup>2</sup>. However, when there is a latent ambiguity in the agreement, oral evidence may be received for the purpose of explaining what the parties to an agreement meant<sup>3</sup>. When there is a patent ambiguity, that is, an ambiguity on the face of the instrument itself, the instrument is void for uncertainty<sup>4</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 690-700; **EQUITY** vol 16(2) (Reissue) PARA 440.

2 *Hitchin v Groom* (1848) 5 CB 515.

3 *Hitchin v Groom* (1848) 5 CB 515 at 520 per Wilde CJ. See also **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 209.

4 See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 208.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(ii) Evidence on which Relief will be Granted/45. Equitable rules.

#### 45. Equitable rules.

In equity, oral evidence is admissible to make out a case for rectification or rescission of an instrument<sup>1</sup>, or to show that what purports to be an agreement is not in fact an agreement at all, for example, where it has been signed by mistake<sup>2</sup>. In such cases the evidence is admissible, not to contradict what appears on the face of the agreement (which the court will not allow), but to prove the existence of a mistake which could not otherwise be proved<sup>3</sup>. Similarly, where mistake cannot be established without evidence, equity will allow a defendant in a claim for specific performance to support a defence founded on mistake by evidence outside the agreement<sup>4</sup>, the evidence being introduced not to explain nor alter the agreement, but consistently with its terms, to show circumstances of mistake or fraud which would make the specific performance of the contract as executed unjust<sup>5</sup>.

1 *Dowager Countess of Shelburne v Earl of Inchiquin* (1784) 1 Bro CC 338 at 341 per Lord Thurlow LC (on appeal sub nom *Earl of Inchiquin v Fitzmaurice* (1875) 5 Bro Parl Cas 166); *Baker v Paine* (1750) 1 Ves Sen 456; *Stait v Fenner* [1912] 2 Ch 504 at 519 per Neville J; *Shipley UDC v Bradford Corp* [1936] Ch 375 at 394-395 per Clauson J (on appeal [1936] Ch 399n, 154 LT 444, CA); *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; cf *Vezey v Rashleigh* [1904] 1 Ch 634. As to rescission see PARA 52 et seq. As to rectification see PARA 57 et seq.

2 *Pym v Campbell* (1856) 6 E & B 370 at 374 per Crompton J; and see *Pattle v Hornibrook* [1897] 1 Ch 25 at 30 per Stirling J.

3 *Baker v Paine* (1750) 1 Ves Sen 456 at 457 per Hardwicke LC; and see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 189-190.

4 *Joynes v Statham* (1746) 3 Atk 388; *Marquis of Townshend v Stangroom* (1801) 6 Ves 328; *Clarke v Grant* (1807) 14 Ves 519 at 524-525; *Ramsbottom v Gosden* (1812) 1 Ves & B 165 at 168 per Sir William Grant MR; *Clowes v Higginson* (1813) 1 Ves & B 524 at 527; *Manser v Back* (1848) 6 Hare 443 at 448; *Wood v Scarth* (1855) 2 K & J 33.

5 *Clowes v Higginson* (1813) 1 Ves & B 524 at 527 per Sir Thomas Plumer V-C. As to specific performance see PARA 51.

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#### 46. Effect of antecedent written agreement.

If there is a previous written agreement which is unambiguous, the disputed instrument will be re-formed in accordance with it, and, if the agreement is ambiguous, oral evidence may be used to explain it according to the ordinary rules applicable in cases of ambiguity<sup>1</sup>. Where the original agreement is of doubtful construction and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion that the conveyance may be the best evidence of the actual agreement between the parties<sup>2</sup>. If the previous written agreement is clear but is vitiated

by the same mistake as is complained of in the instrument, that mistake may be proved by extrinsic evidence, and then the court will rectify the instrument to make it correspond with the real agreement<sup>3</sup>. However, where such a previous agreement is negated by a mistake it cannot be a basis for rectification<sup>4</sup>.

1 *Murray v Parker* (1854) 19 Beav 305 at 308 per Sir John Romilly MR; and see PARA 36.

2 *Humphries v Horne* (1844) 3 Hare 276 at 278.

3 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196 at 201-202, PC.

4 *Monaghan County Council v Vaughan* [1948] IR 306 at 315 per Dixon J.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(ii) Evidence on which Relief will be Granted/47. Limitations on relief on oral evidence only.

#### **47. Limitations on relief on oral evidence only.**

The court is always more cautious about rectifying a document on oral evidence alone<sup>1</sup>. If there is nothing but the recollection of witnesses whose reliability is doubted by the court, and the defendant denies the case set up by the claimant, the claimant may be without remedy<sup>2</sup>. Yet a mistake may nonetheless be rectified where it is clearly proved by oral evidence, even though there is nothing in writing to which the oral evidence may attach<sup>3</sup>. The court may order rectification<sup>4</sup> or rescission<sup>5</sup> on the ground of mistake on the claimant's evidence alone where no further evidence can be obtained, but it requires clear and distinct evidence that there was a different intention when the document was executed<sup>6</sup>. The court is more willing to correct a deed by oral evidence when there is anything in writing beyond the oral evidence<sup>7</sup>. In nearly all cases in which the court has re-formed a settlement, there has been something beyond the oral evidence, such as the instructions for preparing the conveyance or a note by the attorney, and the mistake has been properly accounted for<sup>8</sup>.

1 *Alexander v Crosbie* (1835) L & G temp Sugd 145 at 149 per Sir Edward Burtenshaw Sugden LC. See also *Barrow v Barrow* (1854) 18 Beav 529 (on appeal 5 De GM & G 782, CA); *Kemp v Rose* (1858) 1 Giff 258 at 266; *Meeking v Meeking* (1916) as reported in 115 LT 623.

2 *Mortimer v Shortall* (1842) 2 Dr & War 363; and see *Lord Irnham v Child* (1781) 1 Bro CC 92 at 93 per Lord Thurlow LC; *Marquis of Townshend v Stangroom* (1801) 6 Ves 328 at 334 per Lord Eldon LC; *Fowler v Fowler* (1859) 4 De G & J 250 at 274 per Lord Chelmsford LC; *Bentley v Mackay* (1862) 4 De GF & J 279 at 287 per Turner LJ; *Bloomer v Spittle* (1872) LR 13 Eq 427 at 431 per Lord Romilly MR.

3 *Alexander v Crosbie* (1835) L & G temp Sugd 145 at 150; *Barrow v Barrow* (1854) 18 Beav 529 at 532 per Sir John Romilly MR; *M'Cormack v M'Cormack* (1877) 1 LR Ir 119, CA; *Cook v Fearn* (1878) 48 LJ Ch 63.

4 *Hanley v Pearson* (1879) 13 ChD 545; *Cook v Fearn* (1878) 48 LJ Ch 63; and see *Smith v Iliffe* (1875) LR 20 Eq 666; *Re Colebrook's Conveyances*, *Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397. As to rectification see PARA 57 et seq.

5 *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476. As to rescission see PARA 52 et seq.

6 *Tucker v Bennett* (1887) 38 ChD 1 at 15, CA, per Cotton LJ; *Bonhote v Henderson* [1895] 2 Ch 202, CA; *Fredensen v Rothschild* [1941] 1 All ER 430.

7 *Mortimer v Shortall* (1842) 2 Dr & War 363.

8 *Alexander v Crosbie* (1835) L & G temp Sugd 145 at 149 per Sir Edward Burtenshaw Sugden LC; and see *Mortimer v Shortall* (1842) 2 Dr & War 363 at 374 per Sir Edward Burtenshaw Sugden LC; *M'Cormack v M'Cormack* (1877) 1 LR 119; *Welman v Welman* (1880) 15 ChD 570 at 576 per Malins V-C; *Johnson v Bragge* [1901] 1 Ch 28; *Re Butlin's Settlement Trusts*, *Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483.

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#### **48. Contracts required to be in writing.**

Oral evidence is admissible to make out a case for rectification of a contract<sup>1</sup> if there are no written instructions in existence<sup>2</sup> and notwithstanding statutory provisions requiring contracts to be in writing<sup>3</sup>, and also notwithstanding that the party who adduces that evidence is claiming specific performance of the rectified contract<sup>4</sup>. The contract when rectified becomes a document sufficient to satisfy the statutory requirements<sup>5</sup>.

1 *Barrow v Barrow* (1854) 18 Beav 529 (on appeal 5 De GM & G 782, CA); *Johnson v Bragge* [1901] 1 Ch 28. As to rectification see PARA 57 et seq.

2 *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5.

3 See *Thomas v Davis* (1757) 1 Dick 301 at 303 per Sir Thomas Clarke MR; *Rogers v Earl* (1757) 1 Dick 294; *Re Boulter, ex p National Provincial Bank of England* (1876) 4 ChD 241; *Johnson v Bragge* [1901] 1 Ch 28. As to contracts required to be in writing see **CONTRACT** vol 9(1) (Reissue) PARA 623 et seq.

4 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196 at 201, PC; *Whiting v Diver Plumbing and Heating Ltd* [1992] 1 NZLR 560. As to specific performance see PARA 51.

5 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196 at 201, PC; *Whiting v Diver Plumbing and Heating Ltd* [1992] 1 NZLR 560.

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#### **(iii) Effect of Lapse of Time and Satisfaction of Judgments**

##### **49. When lapse of time is a bar.**

In relation to lapse of time, there are three matters to consider: (1) lapse of time in itself; (2) statutory limitation periods; and (3) laches.

Lapse of time may sometimes in practice be a bar to rectification<sup>1</sup> on account of the lack of evidence and the doubt arising from it<sup>2</sup>, or may afford evidence of acquiescence<sup>3</sup>, but the mere lapse of time of itself, even if a long period, will not be a bar to an equitable remedy if the mistake is clearly made out<sup>4</sup>. The time to be considered is the date of the notice of the error and not the date when the error was made<sup>5</sup>.

Statutory periods of limitation in claims for relief from the consequences of mistake run from the date of discovery of the mistake or the date on which it could by the exercise of reasonable diligence have been discovered<sup>6</sup>, unless the claim is in respect of property to which a third person has acquired rights by purchase for value without knowledge of the mistake or reason to believe it had been made<sup>7</sup>. In the latter case, it seems, time runs from the date on which the

original cause of the claim accrued. Where the discovery of a mistake is the result of judicial interpretation of a statutory provision, the date of discovery for these purposes is the date of the decision<sup>8</sup>. But the limitation periods for claims founded on tort<sup>9</sup>, claims founded on simple contract<sup>10</sup>, claims for libel or slander<sup>11</sup>, claims to enforce awards<sup>12</sup>, claims on a specialty<sup>13</sup>, claims to recover sums under statute<sup>14</sup> and claims to enforce judgments<sup>15</sup> do not apply to claims for equitable relief except in so far as they may be applied by the court by analogy, as they would have been prior to the coming into operation of the Limitation Act 1939<sup>16</sup>. In such cases, the statutory limitation period does not absolutely bind the courts, but they adopt it to assist their discretion<sup>17</sup>.

Nothing in the Limitation Act 1980 affects the equitable jurisdiction to refuse relief on the ground of acquiescence, or otherwise<sup>18</sup>. 'Acquiescence' refers to the case where a person whose rights are being infringed stands by and takes no action, so that the infringer believes that his infringement is being sanctioned<sup>19</sup>. This is an equitable form of estoppel<sup>20</sup>. The alternative expression refers to laches, that is, negligent inactivity<sup>21</sup>. This will only operate where there is no statutory bar, whether express or by analogy<sup>22</sup>. Laches arises where the infringer's circumstances have changed so that it would be inequitable to assert rights as a result of the inactivity of the person whose rights have been infringed<sup>23</sup>, following notice by that person of the mistake<sup>24</sup>. A purchaser of an estate or interest to which equitable rights (to rescission or rectification) attach is in no better position, so far as laches is concerned, than is his vendor<sup>25</sup>.

1 *Bloomer v Spittle* (1872) LR 13 Eq 427 (questioned in *Beale v Kyte* [1907] 1 Ch 564). As to rectification see PARA 57 et seq.

2 *Wolterbeek v Barrow* (1857) 23 Beav 423.

3 *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58 at 72 per Turner LJ.

4 *Wolterbeek v Barrow* (1857) 23 Beav 423 at 431 per Sir John Romilly MR; *Tull v Owen* (1840) 4 Y & C Ex 192 at 203-204; *Millar v Craig* (1843) 6 Beav 433; *M'Cormack v M'Cormack* (1877) 1 LR Ir 119, CA; *Fullwood v Fullwood* (1878) 9 ChD 176; *Re Garnett, Gandy v Macaulay* (1885) 31 ChD 1, CA; *Allcard v Skinner* (1887) 36 ChD 145 at 175, CA, per Cotton LJ; *Burroughes v Abbott* [1922] 1 Ch 86; *Weld v Petre* [1929] 1 Ch 33, CA; *Eason v Brownrigg* [1998] CLY 3659. See also *Gallagher Ltd v Gallagher Pensions Ltd* [2005] EWHC 42 (Ch) at [159]-[160], [2005] All ER (D) 177 (Jan) at [159]-[160], per Etherton J (undertakings given removing all possible prejudice).

5 *Beale v Kyte* [1907] 1 Ch 564; *Corcoran v Wade* [1913] 1 IR 25.

6 See the Limitation Act 1980 s 32(1)(c) (amended by the Consumer Protection Act 1987 s 6(6), Sch 1 para 5); and **LIMITATION PERIODS** vol 68 (2008) PARA 1230.

7 See the Limitation Act 1980 s 32(3), (4); and **LIMITATION PERIODS** vol 68 (2008) PARA 1222.

8 *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449.

9 See the Limitation Act 1980 s 2; and **LIMITATION PERIODS** vol 68 (2008) PARA 979.

10 See the Limitation Act 1980 s 5; and **LIMITATION PERIODS** vol 68 (2008) PARA 952.

11 See the Limitation Act 1980 s 4A; and **LIMITATION PERIODS** vol 68 (2008) PARA 996.

12 See the Limitation Act 1980 s 7; and **LIMITATION PERIODS** vol 68 (2008) PARA 974.

13 See the Limitation Act 1980 s 8; and **LIMITATION PERIODS** vol 68 (2008) PARA 975.

14 See the Limitation Act 1980 s 9; and **LIMITATION PERIODS** vol 68 (2008) PARA 952.

15 See the Limitation Act 1980 s 24; and **LIMITATION PERIODS** vol 68 (2008) PARA 1010.

16 See the Limitation Act 1980 s 36(1) (amended by the Administration of Justice Act 1985 s 57(5); Defamation Act 1996 s 5(1), (5), (6)); and **LIMITATION PERIODS** vol 68 (2008) PARA 919. The Limitation Act 1939 (which consolidated the earlier enactments concerned with the limitation of actions and was itself consolidated



into the Limitation Act 1980) came into operation on 1 July 1940 (see the Limitation Act 1939 s 34(2) (repealed)).

17 *Brooksbank v Smith* (1836) 2 Y & C Ex 58 at 60 per Alderson B; *Knox v Gye* (1872) LR 5 HL 656 at 674 per Lord Westbury.

18 Limitation Act 1980 s 36(2).

19 *Duke of Leeds v Earl of Amherst* (1846) 2 Ph 117 at 123 per Lord Cottenham LC.

20 *De Bussche v Alt* (1878) 8 ChD 286 at 314, CA, per Thesiger LJ.

21 Co Litt 380b; *Smith v Clay* (1767) 3 Bro CC 639n; *Partridge v Partridge* [1894] 1 Ch 351 at 360 per North J. As to laches generally see **EQUITY** vol 16(2) (Reissue) PARAS 910-918.

22 *Archbold v Scully* (1861) 9 HL Cas 360; *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 735, [1962] 1 WLR 86 at 115 per Wilberforce J (affd [1964] Ch 303 at 353, [1963] 3 All ER 1 at 20, CA, per Upjohn LJ).

23 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239-240, PC; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279, HL, per Lord Blackburn; *Orr v Ford* (1989) 167 CLR 316 at 330-346; *Frawley v Neill* (1999) 143 Sol Jo LB 98, (1999) Times, 5 April, CA.

24 *Beale v Kyte* [1907] 1 Ch 564 at 566 per Neville J.

25 *Ernest v Vivian* (1863) 33 LJ Ch 513 at 517-518. As to rescission see PARA 52 et seq. As to rectification see PARA 57 et seq.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(1) IN GENERAL/(iii) Effect of Lapse of Time and Satisfaction of judgments/50. Effect of judgment or award.

## 50. Effect of judgment or award.

After money has been paid under a judgment of a court of competent jurisdiction founded on a particular construction of an agreement and the judgment has thereby been satisfied, it is too late to bring a claim to rectify the agreement on the ground that such a construction was contrary to the intention of all parties<sup>1</sup>. But where rectification is outside the terms of a submission to an arbitrator who makes an award, rectification may later be claimed in a claim to enforce that award<sup>2</sup>.

1 *Caird v Moss* (1886) 33 ChD 22, CA; and see **EQUITY** vol 16(2) (Reissue) PARA 440.

2 *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, [1971] 1 WLR 1390n; affd [1939] 4 All ER 68, CA.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(2) SPECIFIC PERFORMANCE/51. Mistake as a defence to a suit for specific performance.

## (2) SPECIFIC PERFORMANCE

### 51. Mistake as a defence to a suit for specific performance.

Specific performance is equitable relief, given by the court to enforce against a defendant the duty of doing what he agreed by contract to do<sup>1</sup>. Where a contract is void, no question of specific performance (or of damages<sup>2</sup>) arises. On the other hand, if a contract is valid, but the

defendant was mistaken in some way (ex hypothesi insufficient to avoid the contract), the court may in its discretion refuse to award specific performance to the claimant<sup>3</sup>, and may leave him to his remedy of damages at law<sup>4</sup>. But the court will only do so where a hardship amounting to injustice would have been inflicted on him by holding the defendant to his bargain<sup>5</sup>. Even then the court may award specific performance to some lesser extent which avoids the hardship<sup>6</sup>, or specific performance may be granted on terms<sup>7</sup>, or with an abatement (or increase) of the purchase price<sup>8</sup>.

1 As to specific performance generally see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 801 et seq.

2 As to damages generally see **DAMAGES** vol 12(1) (Reissue) PARA 801 et seq.

3 *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875 (both parties mistaken); *Bligh v Martin* [1968] 1 All ER 1157 at 1162, [1968] 1 WLR 804 at 814 per Pennycuik J; *Heath v Heath* [2009] EWHC 1908 (Ch), [2009] Fam Law 1044, [2009] P & CR D58, at [26] per Purle J.

4 See eg *Wood v Scarth* (1855) 2 K & J 33.

5 *Tamplin v James* (1880) 15 ChD 215 at 221, CA, per James LJ; *Slee v Warke* (1949) 86 CLR 271 at 278; *Fragomeni v Fogliani* (1968) 42 ALJR 263.

6 *Preston v Luck* (1884) 27 ChD 497, CA.

7 *Baskcomb v Beckwith* (1869) LR 8 Eq 100 (plaintiff obliged to enter restrictive covenant); *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875 (defendant to enter into fresh contract at a proper price, if required by the plaintiff).

8 *Cato v Thompson* (1882) 9 QBD 616, CA; *Re Aspinall and Powell's Contract* (1889) 5 TLR 446; *Rudd v Lascelles* [1900] 1 Ch 815; *Jacobs v Revell* [1900] 2 Ch 858; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(3) RESCISSION/52. In general.

### (3) RESCISSION

#### 52. In general.

The term 'rescission' bears a number of meanings in English law<sup>1</sup>. This is apt to cause confusion<sup>2</sup>. For the purposes of this title it refers to the process by which a transaction, valid at law, is set aside by a court of equity for mistake<sup>3</sup>. In considering rescission as a remedy, it must be remembered that before 1875 courts of equity exercised a number of different jurisdictions<sup>4</sup>. These included: (1) that which was concurrent with courts of common law (for example, cases of fraud); (2) that which was auxiliary to the common law (for example, bills of discovery); and (3) that which was exclusive to equity (for example, trusts)<sup>5</sup>. Equitable remedies, including rescission, might be available in all of these, but authorities on rescission in one of these jurisdictions are not necessarily determinative in others<sup>6</sup>, and authorities dealing with rescission for misrepresentation may not necessarily govern rescission for mistake, as rescission in the former case was the act of the innocent party<sup>7</sup>, whereas in the latter it was the act of the court<sup>8</sup>.

If the mistake was such as to prevent property passing, whether at law or in equity, rescission has nothing to do with the matter<sup>9</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARA 986.

2 *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1882) 9 QBD 648 at 671, CA, per Lindley LJ; *Buckland v Farmer and Moody* [1978] 3 All ER 929 at 938, [1979] 1 WLR 221 at 231-232, CA, per Buckley LJ; *Johnson v Agnew* [1980] AC 367 at 396-398, [1979] 1 All ER 883 at 892-894, HL, per Lord Wilberforce; *Photo Productions Ltd v Securicor Transport Ltd* [1980] AC 827 at 844, [1980] 1 All ER 556 at 562, HL, per Lord Wilberforce.

3 See eg *Cooper v Phibbs* (1867) LR 2 HL 149.

4 The Supreme Court of Judicature Acts 1873 and 1875 brought together the administration of law and equity: see **EQUITY** vol 16(2) (Reissue) PARA 401.

5 Story *Equity Jurisprudence* paras 75-76, 960, 1480-1481; Snell *Equity* (31st Edn, 2005) pp 12-13; 1 Holdsworth's *History of English Law* (7th Edn) pp 454, 459; Meagher, Gummow and Lehane *Equity--Doctrines and Remedies* (4th Edn, 2002) paras 1-090-1-110.

6 Sugden *Vendor and Purchaser* (14th Edn, 1862) pp 797-798. See also *Alati v Kruger* (1955) 94 CLR 216 at 223-224; *O'Sullivan v Management Agency and Music Ltd* [1985] 3 All ER 351 at 364-365, CA, per Dunn LJ; Meagher, Gummow and Lehane *Equity--Doctrines and Remedies* (4th Edn, 2002) paras 24-075-24-085.

7 *Reese River Silver Mining Co v Smith Ltd* (1869) LR 4 HL 64; *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] AC 773, HL.

8 *Cooper v Phibbs* (1867) LR 2 HL 149.

9 See PARAS 79-80.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(3) RESCISSION/53. Rescission for mistake.

### 53. Rescission for mistake.

Historically it is doubtful that equity had any role in setting aside mistaken transactions, other than to follow the law<sup>1</sup>. From the mid-twentieth century, however, a line of authorities evolved which suggested that it had a wider jurisdiction<sup>2</sup>, stating that equity could not only set aside a transaction for mistake on grounds which, if they existed at law, would result in the parties being not liable to perform<sup>3</sup>, but could do so also on grounds which would not have that effect at law. These decisions were made in cases of common or mutual mistake as to subject matter or as to quality. The tests suggested, however, were vague<sup>4</sup>, referring to 'fundamental misapprehension'<sup>5</sup>, 'common mistake on a matter of fundamental importance'<sup>6</sup>, 'common mistake which was fundamental'<sup>7</sup>, 'mutual mistake in a fundamental and vital matter'<sup>8</sup>, and 'serious mistake' about a 'fundamental term'<sup>9</sup>. Recent English authority, however, holds that there is in fact no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of common law<sup>10</sup>.

The same line of authorities had also asserted a power to set aside transactions, in the exercise of discretion, on terms<sup>11</sup> going beyond *restitutio in integrum*<sup>12</sup> or the taking of accounts<sup>13</sup>. These cases must now, however, be considered afresh: they are based on precedent which will not bear their weight<sup>14</sup>; the appellate judgments involved dissent<sup>15</sup>; one has been expressly disapproved by the Court of Appeal<sup>16</sup>; and some others of them have been doubted<sup>17</sup>.

There is also authority that there is no equitable jurisdiction to grant rescission of a contract where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract<sup>18</sup>.

1 *Stewart v Stewart* (1839) 6 Cl & Fin 911 at 968, HL, per Lord Cottenham LC; *Re Tyrell, Tyrell v Woodhouse* (1900) 82 LT 675; cf Story *Equity Jurisprudence* ch V; Meagher, Gummow and Lehane, *Equity--Doctrines and Remedies* (4th Edn, 2002) paras 14-100-14-105.

2 See *Solle v Butcher* [1950] 1 KB 671 at 692-693, [1949] 2 All ER 1107 at 1119-1120, CA, per Denning LJ; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891 at 893, CA, per Lord Denning MR; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 914, [1989] 1 WLR 255 at 270 per Steyn J; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 959, [1994] 1 WLR 1016 at 1042, CA, per Evans LJ.

3 Eg *Cooper v Phibbs* (1867) LR 2 HL 149.

4 In some of these cases an element of knowledge or sharp practice is also stated to be required (*Solle v Butcher* [1950] 1 KB 671 at 692, [1949] 2 All ER 1107 at 1120, CA, per Denning LJ; *Taylor v Johnson* (1983) 151 CLR 422 at 432; cf *Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 233 per Lord Chelmsford), and in some an absence of fault on the part of the mistaken party (*Solle v Butcher* above at 692 and 1120 per Denning LJ; *Grist v Bailey* [1967] Ch 532 at 542, [1966] 2 All ER 875 at 880 per Goff J; *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891 at 893-894, CA, per Lord Denning MR; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810 at 819, [1978] 1 WLR 1128 at 1138 per Brian Dillon QC; *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1988] 3 All ER 902 at 913, [1989] 1 WLR 255 at 269 per Steyn J).

5 *Solle v Butcher* [1950] 1 KB 671 at 693, [1949] 2 All ER 1107 at 1120, CA, per Denning LJ.

6 *Solle v Butcher* [1950] 1 KB 671 at 686, [1949] 2 All ER 1107 at 1116, CA, per Buckhill LJ.

7 *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891 at 893, CA, per Lord Denning MR; *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810 at 819, [1978] 1 WLR 1128 at 1137-1138 per Brian Dillon QC.

8 *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 518, [1969] 2 All ER 891 at 896, CA, per Fenton Atkinson LJ.

9 *Taylor v Johnson* (1983) 151 CLR 422.

10 See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407 at [157], [2003] QB 679 at [157], [2002] 4 All ER 689 at [157] per Lord Phillips of Worth Matravers MR (disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA). The court held that the decision in *Solle v Butcher* above, and the cases which followed it (see the text and notes 2-9), amounted less to an equitable mitigation of the common law rule established in *Bell v Lever Bros Ltd* [1932] AC 161, HL (that mistake will not avoid a contract unless it renders its subject matter essentially and radically different from that which the parties had believed to exist: see PARAS 7, 21-23) than to a redrawing of that rule's boundaries for which there was no equitable justification: *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* above at [156] per Lord Phillips of Worth Matravers MR.

11 See *Solle v Butcher* [1950] 1 KB 671 at 697, [1949] 2 All ER 1107 at 1122, CA, per Denning LJ; *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875.

12 See PARA 43.

13 See PARA 56.

14 *Cooper v Phibbs* (1867) LR 2 HL 149; Matthews 'A Note on *Cooper v Phipps*' (1989) 105 LQR 599.

15 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA (Jenkins LJ dissenting); *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, CA (Winn LJ dissenting).

16 See *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407 at [153]-[160], [2003] QB 679 at [153]-[160], [2002] 4 All ER 689 at [153]-[160] per Lord Phillips of Worth Matravers MR (disapproving *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA).

17 *Fawcett v Star Car Sales Ltd* [1960] NZLR 406 at 416-418, NZCA, per Gresson P; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 952, [1994] 1 WLR 1016 at 1035, CA, per Hoffmann LJ.

18 *Statoil ASA v Louis Dreyfus Energy Services LP, The Harriette N* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035, [2008] 2 Lloyd's Rep 685 (disapproving statements made by Andrew Smith J in *Huyton SA v Distribuidora Internacional de Productos Agrícolas SA* [2002] EWHC 2088 (Comm) at [455], [2002] All ER (D) 387 (Oct) at [455]).

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#### 54. Voluntary instruments.

In a proper case the court will set aside a voluntary deed executed for the purpose of carrying out trusts declared orally, but which is wholly inconsistent with those trusts<sup>1</sup>, or which does not carry out the full arrangement, even after the death of the grantee<sup>2</sup> or of both the donor and donee<sup>3</sup>.

Similarly, an appointment will be set aside where the appointor exercises the power in forgetfulness that he has already made an appointment earlier to the same person<sup>4</sup>, or where the power is exercised in ignorance of serious breaches of duty owed by the appointee to the appointor<sup>5</sup>. Where a trustee exercises a discretion under the terms of a trust (eg a power of appointment), but fails to take into account considerations which he ought to have taken into account, or takes into account considerations which he ought not to have taken into account, and this would<sup>6</sup> or might<sup>7</sup> have made a material difference in exercising the discretion, such exercise is open to attack<sup>8</sup>. Considerations which the trustee ought to have taken into account may include the fiscal consequences of the particular exercise of discretion<sup>9</sup>. It may be that, for an attack to succeed, there must also be shown to be a breach of duty or default on the part of the trustee<sup>10</sup>. In principle, where the exercise of discretion is successfully attacked on these grounds it should be void, and the majority of the cases so hold<sup>11</sup>: however, a modern view is that it is voidable only, so that terms may be imposed to prevent injustice<sup>12</sup>. The court will not apply these principles so as to do something which the trustee might have done, but in fact by mistake did not do<sup>13</sup>.

A deed will also be set aside if the disponor of property under it did not intend the transaction to have the effect it did, so long as the mistake is as to the effect of the transaction, and not merely as to its consequences or the advantages flowing from it<sup>14</sup>. There is a wide equitable jurisdiction to relieve from the consequences of mistake<sup>15</sup>, and there is no reason in principle why this jurisdiction should be limited to voluntary settlements in the strict sense<sup>16</sup>.

1 *Lister v Hodgson* (1867) LR 4 Eq 30.

2 *Hughes v Seanor* (1870) 18 WR 1122.

3 *Phillipson v Kerry* (1863) 32 Beav 628.

4 *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476.

5 *Sybron Corp'n v Rochem Ltd* [1984] Ch 112, [1983] 2 All ER 707, CA.

6 *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25, [1974] 2 All ER 193; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513 at 555, [1990] 1 WLR 1587 at 1624, per Warner J; *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344; *Green v Cobham* [2002] STC 820; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, sub nom *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] 1 All ER 763.

7 *Kerr v British Leyland (Staff) Trustees Ltd* [1986] CA Transcript 286, CA; *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27, [1991] PLR 225, CA; *AMP (UK) Ltd plc v Barker* (2000) 3 ITEL 414; *Hearn v Younger* [2002] EWHC 963 (Ch), [2003] OPLR 45.

8 *Re Hastings-Bass, Hastings-Bass v IRC* [1975] Ch 25 at 41, [1974] 2 All ER 193 at 203, per Buckley LJ. Cf *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 All ER 1216 [2009] ICR 1 (action compromised: see *Smithson v Hamilton* [2008] EWCA Civ 996) (the rule in *Re Hastings-Bass* above applies to things done by trustees, not to things done by settlors in the context of private trusts or by employers in the context of pension trusts).

9 *Green v Cobham* [2002] STC 820; *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344; *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569, [2005] All ER (D) 351 (Feb), at [19] per Mann J.

10 *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, sub nom *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] 1 All ER 763; cf *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569, [2005] All ER (D) 351 (Feb), at [21]-[22], per Mann J.

11 *Kerr v British Leyland (Staff) Trustees Ltd* [1986] CA Transcript 286, CA; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27, [1991] PLR 225, CA; *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414; *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344; *Green v Cobham* [2002] STC 820.

12 *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, sub nom *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] 1 All ER 763; cf *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569, [2005] All ER (D) 351 (Feb), at [24] per Mann J; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at [162]-[170], [2005] All ER (D) 177 (Jan) at [162]-[170] per Etherton J.

13 *Breadner v Granville-Grossman* [2001] Ch 523, [2000] 4 All ER 705.

14 *Gibbon v Mitchell* [1990] 3 All ER 338 at 343, [1990] 1 WLR 1304 at 1309 per Millett J; *Dent v Dent* [1996] 1 All ER 659 at 669, [1996] 1 WLR 683 at 693 per David Young QC; *Wolff v Wolff* [2004] EWHC 2110 (Ch), [2004] STC 1633.

15 *Gibbon v Mitchell* [1990] 3 All ER 338 at 341, [1990] 1 WLR 1304 at 1307 per Millett J.

16 *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [82] per Lawrence Collins J.

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## 55. Passing of property.

If property passes as a result of fraud, the innocent party has the option to rescind the transaction, and revest title in himself<sup>1</sup>. For chattels this was so both at law and in equity; in such a case, the legal title revests without the assistance of the court<sup>2</sup>, and the innocent party kept out of possession can thereafter maintain an action for unlawful interference with goods<sup>3</sup>. In the case of land, however, the common law cannot act, and equity has to intervene, to order the revesting of the legal estate<sup>4</sup>. If, before this occurs, the innocent party retakes possession, the transferee is able to maintain an action at law<sup>5</sup>.

However, where mistake not induced by fraud is concerned, the matter is entirely in equity. On rescission the innocent party obtains at most an equitable interest in the property concerned<sup>6</sup>, and the legal title will not revest until either there is a retransfer, or a vesting order is made. Even though the equitable interest may revert ab initio, that will not render automatically wrong anything done by the legal owner up until then<sup>7</sup>.

1 *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26.

2 *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26.

3 As to actions for unlawful interference with goods see **TORT** vol 45(2) (Reissue) PARA 542 et seq.

4 *Feret v Hill* (1854) 15 CB 207.

5 *Feret v Hill* (1854) 15 CB 207.

6 *Cooper v Phibbs* (1867) LR 2 HL 149.

7 *Bristol and West Building Society v Mothew* [1998] Ch 1 at 23, [1996] 4 All ER 698 at 716-717, CA, per Millett LJ.

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## 56. Practice.

A claim for the setting aside or cancellation of an instrument in writing is assigned to the Chancery Division of the High Court<sup>1</sup>.

Where a voluntary deed is impeached, the burden of supporting it does not necessarily rest on those who set it up<sup>2</sup>. Where an appointment under a settlement is set aside, the court may direct a note of the appointment and a copy of the order rescinding it to be indorsed on the settlement<sup>3</sup>.

When a conveyance is set aside on the ground of mistake, an account of rents and profits may be directed and interest charged on purchase money<sup>4</sup>. Occupation rent may also be charged, and sums expended on repairs and improvements may be ordered to be repaid<sup>5</sup>. Other orders indemnifying the parties so that they may be restored to their original positions may also be made, but damages cannot be given<sup>6</sup>.

Where a lease of a dwelling house was granted under a mutual misapprehension that it was not within the Rent Acts<sup>7</sup>, the lease was set aside on terms which would enable the tenant either to stay on at the proper rent or to leave<sup>8</sup>. Where a contract of sale of freehold property was negotiated under the mistaken belief that it was subject to a statutory tenancy, it was set aside on the condition that the vendor should enter into a fresh contract at a proper vacant possession price if required by the purchaser<sup>9</sup>. However, more recent English authority holds that rescission is an 'all or nothing' remedy: if it applies, it applies to set aside the whole transaction, subject only to *restitutio in integrum*<sup>10</sup>.

Where a party to a contract containing an exclusive jurisdiction clause claims rescission of the contract on the grounds of fraud or mutual mistake, that party may not be required to comply with the jurisdiction clause<sup>11</sup>.

1 See the Senior Courts Act 1981 s 61(1), Sch 1 para 1(g); and **COURTS** vol 10 (Reissue) PARA 611. As to the renaming of the Senior Courts Act 1981 see PARA 2 note 8. As to the assignment of proceedings in the High Court generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 43 et seq. As to the consequences of commencing proceedings in the wrong division see *Apac Rowena Ltd v Norpol Packaging Ltd* [1991] 4 All ER 516. As to the rectification or setting aside of deeds generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 67 et seq.

2 *Henry v Armstrong* (1881) 18 ChD 668; *Tucker v Bennett* (1887) 38 ChD 1 at 9, CA, per Cotton LJ.

3 *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 at 484 per Eve J.

4 *Neesom v Clarkson* (1842) 2 Hare 163; *Bloomer v Spittle* (1872) LR 13 Eq 427.

5 *Neesom v Clarkson* (1842) 2 Hare 163; *Bloomer v Spittle* (1872) LR 13 Eq 427; *Devald and Davald v Zigeuner and Zigeuner* (1958) 16 DLR (2d) 285. See also *Nutt v Read* (16 February 1999, unreported) (affd (1999) 32 HLR 761, (1999) Times 3 December, CA).

6 As to the distinction between an indemnity and damages see *Whittington v Seale-Hayne* (1900) 82 LT 49, 16 TLR 181; and **EQUITY** vol 16(2) (Reissue) PARA 414.

7 As to the Rent Acts see **LANDLORD AND TENANT** vol 27(2) (2006 Reissue) PARA 808.

8 *Solle v Butcher* [1950] 1 KB 671 at 689, 696-698, 707, [1949] 2 All ER 1107 at 1118, 1122, 1128, CA, per Denning LJ (although this decision has been disapproved by the Court of Appeal on the grounds that the equitable jurisdiction supporting it did not exist: see *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd, The Great Peace* [2002] EWCA Civ 1407 at [153]-[160], [2003] QB 679 at [153]-[160], [2002] 4 All ER 689 at [153]-[160] per Lord Phillips of Worth Matravers MR; and PARA 53).

9 *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875 (doubted in *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 952, [1994] 1 WLR 1016 at 1035, CA, per Hoffmann LJ).

10 See PARA 43.

11 *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 All ER (Comm) 261, [1999] 1 Lloyd's Rep 784 (the allegation of mutual mistake impeaches the jurisdiction clause by reason of lack of consent).

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## **(4) RECTIFICATION**

### **57. General considerations affecting the grant of relief.**

Rectification is an equitable remedy by which the court will modify the terms of a written instrument so as to give effect to the intention of the parties to it<sup>1</sup>. That intention may be genuinely agreed on by the parties (where there is consensus ad idem), or it may be by estoppel (where it is the intention of only one of them, but the other is estopped from denying that it is his as well)<sup>2</sup>. It is thus the mistake in the way in which the agreement is expressed in writing that is rectified, and not a mistake in the agreement itself<sup>3</sup>.

If the parties' genuine or estoppel consensus is accurately recorded in the document, there can be no rectification<sup>4</sup>. However, the document can be rectified if both parties believe that the document expresses their (genuine or apparent) consensus but they are both mistaken in that on its true construction it does not carry out their common intention<sup>5</sup>. Rectification on these grounds is available not only where particular words have been added, omitted or wrongly written as a result of careless copying or the like, but also where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of construction<sup>6</sup>.

A document can also be rectified where one party sees that the other mistakenly believes that the document expresses that other's own intention, realises that this mistake may operate to that party's disadvantage, but says nothing about it and executes the instrument as it stands<sup>7</sup>. In such a case, there is no estoppel consensus on the terms of the document, because the knowing party is not deceived by the mistaken party's representation that he intended to be bound by those terms<sup>8</sup>. Instead there is an estoppel binding the knowing party, preventing him from relying on the document to show that a different agreement was made than that alleged by the mistaken party<sup>9</sup>. Thus, as against the mistaken party, the document does not avail the knowing party, and equity will rectify it to make it conform to the agreement the mistaken party believed to exist<sup>10</sup>.

In the case of common mistake there are (or may be) cross representations, but they can only found estoppels preventing either party from setting up the document as the true agreement between them, and therefore preventing either party from resisting rectification<sup>11</sup>.

Except in the circumstances described above, there can be no rectification. In particular, unilateral mistake by itself will not suffice<sup>12</sup>. It is not the function of the court to rectify an agreement merely because one party has been tough or successful in negotiations and the other has been unwise, missed a point or has failed to appreciate the likely consequences of the agreement<sup>13</sup>. In the case of a deed poll or voluntary transaction, it is the intention of the maker or donor that must be considered<sup>14</sup>.

Even where the transaction concerned has more than one party, there is no need for an antecedent agreement<sup>15</sup>. English authorities indicate that some outward manifestation of



accord of intention must be shown<sup>16</sup>. This may be more difficult where the document has been drafted on behalf of both parties by a third party<sup>17</sup>.

In rectifying a document, the court acts on the principle that the parties are to be placed as far as possible in the same position as that in which they would have stood if the error to be corrected had not been made<sup>18</sup>. The mere fact that the sole purpose of rectification is a tax advantage is not a bar<sup>19</sup>. Nor is the fact that the mistake occurred through the negligence of the claimant or his adviser<sup>20</sup>. Where the document concerned has been drafted by a third party, there is no reason in principle why rectification should not be available both in cases where a different person is responsible for preparing the text for each party and where only one person has that responsibility for both parties, although there may be evidential difficulties in establishing either the necessary agreement or common intention (in the former case) or the 'outward expression' (in the latter case)<sup>21</sup>.

Normally a claim for rectification must be specifically pleaded, but the court may grant relief even though it is not asked for in the statement of case<sup>22</sup>. The pleading by one party of alternative forms of rectification does not negate the existence of a common intention<sup>23</sup>. The court will not act on the footing of fraud unless fraud is pleaded with the utmost particularity<sup>24</sup>.

1 *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68, [1971] 1 WLR 1390n, CA; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483; *Re Slocock's Will Trusts* [1979] 1 All ER 358; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267, [2009] All ER (D) 12 (Jul); and see **EQUITY** vol 16(2) (Reissue) PARA 440.

2 As to estoppel see PARA 28.

3 *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375 per James V-C ('courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts'); *Mace v Rutland House Textiles Ltd (in administrative receivership)* [1999] 46 LS Gaz R 37.

4 *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

5 *Rooke v Lord Kensington* (1856) 2 K & J 753; *Hills v Rowland* (1853) 4 De GM & G 430 at 436 per Turner LJ; *Thompson v Whitmore* (1860) 1 John & H 268; *Sells v Sells* (1860) 1 Drew & Sm 42; *Earl of Bradford v Earl of Romney* (1862) 30 Beav 431 at 438 per Sir John Romilly MR; *Eaton v Bennett* (1865) 34 Beav 196; *Re Walsh's Estate* (1867) 15 WR 1115 at 1117 per Brewster C; *Paget v Marshall* (1884) 28 ChD 255; *May v Platt* [1900] 1 Ch 616 at 623 per Farwell J; *Slack v Hancock* (1912) 107 LT 14; *Whiteley v Delaney* [1914] AC 132, HL; *Letts v Excess Insurance Co* (1916) 32 TLR 361; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC; *Blay v Pollard* [1930] 1 KB 628 at 633, CA, per Scrutton LJ; *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470; *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA; *Agip SpA v Navigazione Alta Italia SpA, The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353 at 359, CA, per Slade LJ; *London Regional Transport v Wimpey Group Services Ltd* (1986) 53 P & CR 356, [1986] 2 EGLR 41; *Hamed El Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 (affd [1994] 1 Lloyd's Rep 382, CA). The pleading by one party of alternative forms of rectification does not negate the existence of a common intention: *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, [2002] 23 EG 123.

6 *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67, [1936] 3 All ER 193; *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913, CA; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251 at 260-261, [1976] 2 All ER 483 at 487 per Brightman J; *Re Slocock's Will Trusts* [1979] 1 All ER 358; *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365 at 367-368; *Grand Metropolitan plc v William Hill Group Ltd* [1997] 1 BCLC 390; *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414.

7 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA; *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA. Cf *Board of Trustees of the National Provident Fund v Brierley Investments Ltd* [1997] 1 NZLR 1 at 6, PC (party did not knowingly take advantage of other party's mistake); *Templiss Properties Ltd v Hyams* [1999] EGCS 60; *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33, NZCA; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267, [2009] All ER (D) 12 (Jul); *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255, [2009] All ER (D) 255 (Nov).

8 See eg *Hartog v Colin and Shields* [1939] 3 All ER 566.

- 9 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545.
- 10 See eg *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA.
- 11 *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; cf *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA.
- 12 *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545; *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA; *George Wimpey UK Ltd v VIC Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135, (2005) Times, 16 Feb.
- 13 *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [1999] EGCS 83; and see PARA 59.
- 14 See PARAS 63-65.
- 15 *Shipleigh UDC v Bradford Corp'n* [1936] Ch 375 at 395 per Clauson J (on appeal [1936] Ch 399n, 154 LT 444, CA); *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, [1971] 1 WLR 1390n (affd [1939] 4 All ER 68, CA); *Slee v Warke* (1949) 86 CLR 271; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1972) 128 CLR 336 at 350 per Hope J; cf *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375 per Sir WM James V-C; *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 27 TLR 236, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196 at 200-201, PC.
- 16 *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 at 461-462 [1953] 2 All ER 739 at 747-748, CA, per Denning LJ; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [60] per Lawrence Collins J; *JIS (1974) Ltd v MCE Investment Nominees Ltd* [2003] EWCA Civ 721, [2003] 24 LS Gaz R 36, [2003] All ER (D) 155 (Apr), at [31]-[34] per Carnwath LJ; cf Bromley 'Rectification in Equity' (1971) 87 LQR 532. Cf also the view taken by the Australian authorities, that it is enough that the parties can be proved in some admissible way in fact to have had the intention: *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429; *Pukallus v Cameron* (1982) 180 CLR 447 at 552; *Elders Trustee and Executor Co Ltd v EG Reeves Pty Ltd* (1987) 78 ALR 193 at 253-254 per Gummow J; *Re BT Property Trust* (31 March 1998, unreported), NSW SC, per Hamilton J; cf *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 29-30 per Tipping J.
- 17 *Mace v Rutland House Textiles Ltd (in administrative receivership)* [1999] 46 LS Gaz R 37.
- 18 *Walker v Armstrong* (1856) 8 De GM & G 531 at 544 per Turner LJ; *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P & CR 187, [2007] All ER (D) 245 (Apr), at [16] per Carnwath LJ; and see *Barrow v Barrow* (1854) 18 Beav 529 at 532 per Sir John Romilly MR.
- 19 *Re Colebrook's Conveyances, Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397; *Re Slocock's Will Trusts* [1979] 1 All ER 358 at 363 per Graham J.
- 20 *Templiss Properties Ltd v Hyams* [1999] EGCS 60.
- 21 *Mace v Rutland House Textiles Ltd (in administrative receivership)* [1999] 46 LS Gaz R 37.
- 22 *Butler v Mountview Estates Ltd* [1951] 2 KB 563 at 571, [1951] 1 All ER 693 at 700 per Danckwerts J.
- 23 See *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, [2002] 23 EG 123.
- 24 *Blay v Pollard* [1930] 1 KB 628, CA.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(4) RECTIFICATION/58. Instruments which may be rectified.

## 58. Instruments which may be rectified.

In a proper case the court will rectify a court order<sup>1</sup>, a deed of settlement<sup>2</sup>, an appointment<sup>3</sup>, a deed of revocation<sup>4</sup>, a deed of variation<sup>5</sup>, a lease<sup>6</sup>, a bond<sup>7</sup>, a bill of exchange<sup>8</sup>, bought and sold notes<sup>9</sup>, a tax computation<sup>10</sup>, a schedule of quantities annexed to a contract to execute works for a gross sum, purporting to show how the gross sum is made up<sup>11</sup>, an insurance policy<sup>12</sup> and a

declaration of shipment under a marine insurance policy, even after a loss has become known<sup>13</sup>.

Rectification is also available where words were purposely used or omitted but in the mistaken belief that they bore a different meaning from their correct meaning as a matter of construction<sup>14</sup>. Of course, where words are deliberately omitted it may be more difficult to establish that some other effect was intended<sup>15</sup>.

There are special rules relating to the rectification of wills<sup>16</sup>, to the rectification of the land register<sup>17</sup>, to the rectification of the register of common land or town or village greens<sup>18</sup>, and to the rectification of contracts for the sale or other disposition of an interest in land<sup>19</sup>.

1 *Standley v Stewkesbury* [1998] 2 FLR 610, CA; cf *Loseby v Newman* [1995] 2 FLR 754, CA (court will not rectify defective committal order unless there are exceptional circumstances).

2 *Walsh v Trevanion* (1848) 16 Sim 178 at 179 (subsequent proceedings (1850) 15 QB 733); *Ashhurst v Mill, Mill v Ashhurst* (1848) 7 Hare 502; *Torre v Torre* (1853) 1 Sm & G 518; *Smith v Iliffe* (1875) LR 20 Eq 666; *Cogan v Duffield* (1876) 2 ChD 44, CA; *Re Bird's Trusts* (1876) 3 ChD 214; *Hanley v Pearson* (1879) 13 ChD 545; *Welman v Welman* (1880) 15 ChD 570; *Fitzgerald v Fitzgerald* [1902] 1 IR 477, CA; *Banks v Ripley* [1940] Ch 719, [1940] 3 All ER 49; *Re Butlin's Settlement Trust, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483; *Re Slocock's Will Trusts* [1979] 1 All ER 358.

3 *Wilkinson v Nelson* (1861) 9 WR 393.

4 *Re Walton's Settlement, Walton v Peirson* [1922] 2 Ch 509, CA.

5 *Seymour v Seymour* (1989) Times, 16 February.

6 *Mortimer v Shortall* (1842) 2 Dr & War 363; *Murray v Parker* (1854) 19 Beav 305; *Paget v Marshall* (1884) 28 ChD 255; *Cowen v Truefitt Ltd* [1899] 2 Ch 309, CA; cf *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089 (tenant not entitled to rectification of tenancy agreement against bona fide purchaser for value without notice); *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P & CR 187, [2007] All ER (D) 245 (Apr) (landlord unable to establish convincing proof (see further PARA 61)).

7 *Simpson v Vaughan* (1739) 2 Atk 31; *Bishop v Church* (1751) 2 Ves Sen 371; *Thomas v Frazer* (1797) 3 Ves 399; *Burn v Burn* (1798) 3 Ves 573; *Hodgkinson v Wyatt* (1846) 9 Beav 566 at 569.

8 *Druiff v Lord Parker* (1868) LR 5 Eq 131.

9 *Caraman, Rowley and May v Aperghis* (1923) 40 TLR 124.

10 *R v Inspector of Taxes, ex p Bass Holdings Ltd, Richart (Inspector of Taxes) v Bass Holdings Ltd* [1993] STC 122.

11 *Neill v Midland Rly Co* (1869) 20 LT 864.

12 See *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317.

13 *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18.

14 *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67, [1936] 3 All ER 193; *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913; *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251 at 260-261, [1976] 2 All ER 483 at 487-488 per Brightman J; *Re Slocock's Will Trusts* [1979] 1 All ER 358; *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365 at 367-368; *Grand Metropolitan plc v William Hill Group Ltd* [1997] 1 BCLC 390 at 394 per Arden J; *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414. Cf *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; *Lord Irnham v Child* (1781) 1 Bro CC 92; *Marquis of Townshend v Stangroom* (1801) 6 Ves 328 at 332; *Crawley Borough Council v Bradford & Bingley Building Society* (23 July 1998, unreported), CA.

15 *Re Slocock's Will Trusts* [1979] 1 All ER 358 at 362 per Graham J.

16 See PARA 64.

17 See PARA 26.

18 See the Commons Act 2006 s 19; and **COMMONS** vol 13 (2009) PARA 534.

19 Where a contract for the sale or other disposition of an interest in land satisfies the conditions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (see **SALE OF LAND** vol 42 (Reissue) PARA 29) by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract comes into being, or is deemed to have come into being, at such time as may be specified in the order: s 2(4). See *Oun v Ahmad* [2008] EWHC 545 (Ch), [2008] 2 P & CR D7, 152 Sol Jo (no 14) 32, [2008] All ER (D) 270 (Mar) (court unable to rectify a document to include a term the parties agreed should be omitted from the written record, and hence could not produce a valid contract for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 2).

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(4) RECTIFICATION/59. When rectification will not be granted.

### **59. When rectification will not be granted.**

The court will not rectify an instrument when no relief is required as between the parties to it<sup>1</sup>, although that does not mean that there must be an adversarial issue between them<sup>2</sup>. The fact that all parties to the application desire rectification is not a bar<sup>3</sup>.

The court will not rectify a settlement to make it conform with what would have been the contract between the parties had they taken all the material facts known by them into consideration<sup>4</sup>; nor does the doctrine extend to cases where as regards some particular subject matter the parties had no intention at all, even if it could be shown that had it been in their minds they would have now some particular intention with regard to it<sup>5</sup>. Rectification will also not be granted in order retrospectively to impute an intention that was not present at the time the instrument was executed<sup>6</sup>, nor so as to make a document do something other than that which was intended at the time of its drafting, even if that other thing would be more in keeping with the draftsman's intentions or it would in fact be impossible to do what the document attempted to do<sup>7</sup>. It is not the function of the court to rectify an agreement merely because one party has been tough or successful in negotiations and the other has been unwise, missed a point or has failed to appreciate the likely consequences of the agreement<sup>8</sup>. If the written contract accurately gives effect to the intention of the parties, frustration of that intention by a later statute is not a ground for rectification<sup>9</sup>, nor is the fact that the court considers that the suggested rectification would be better<sup>10</sup>.

Where the contract accurately describes the subject matter of the contract, it will not be rectified because the parties mistakenly believed it to have different features or include other property within it<sup>11</sup>.

The right to rectify can be lost by the acquisition of rights in the subject matter of the transaction by a purchaser for value without notice<sup>12</sup>.

The court has no jurisdiction to rectify the articles of association of a company<sup>13</sup>.

1 *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913, CA; *Van der Linde v Van der Linde* [1947] Ch 306. Cf *Behrers v Heilbut* (1956) 222 LT Jo 290; *Re Slocock's Will Trusts* [1979] 1 All ER 358 at 363 per Graham J.

2 *Re Colebrook's Conveyances, Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397; *Re Slocock's Will Trusts* [1979] 1 All ER 358; *Seymour v Seymour* (1989) Times, 16 February.

3 *Seymour v Seymour* (1989) Times, 16 February; *Lake v Lake* [1989] STC 865.

4 See *Barrow v Barrow* (1854) 18 Beav 529 at 533, where the court did not deal with the question of rectification (on appeal 5 De GM & G 782); *Frederick E Rose (London) Ltd v Williams H Pim Jnr & Co Ltd* [1953] 2 QB 450, [1953] 2 All ER 739, CA; *Tankel v Tankel* [1999] 1 FLR 676.

5 *Harlow Development Corp'n v Kingsgate (Clothing Productions) Ltd* (1973) 226 Estates Gazette 1960.

- 6 *Bank of Scotland v Brunswick Developments (1987) Ltd (No 2)* 1999 SLT 716, HL.
- 7 *Collins v Jones* (2000) Times, 3 February.
- 8 *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [1999] EGCS 83.
- 9 *Pyke v Peters* [1943] KB 242.
- 10 *Tankel v Tankel* [1999] 1 FLR 676.
- 11 *Pukallus v Cameron* (1982) 180 CLR 447.
- 12 See PARA 42.
- 13 *Scott v Frank F Scott (London) Ltd* [1940] Ch 794, [1940] 3 All ER 508, CA.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(4) RECTIFICATION/60. Relief for party who prepared the instrument.

## **60. Relief for party who prepared the instrument.**

It seems that the court is less willing to rectify an instrument where the party seeking relief is the person who prepared and perfected it<sup>1</sup>, but in a proper case the court will not, on this account, refuse to grant relief<sup>2</sup>, although it may refuse to give him his costs<sup>3</sup>.

- 1 *Ex p Wright* (1812) 19 Ves 255; *Collett v Morrison* (1851) 9 Hare 162 at 176-177 per Turner V-C.
- 2 *Ball v Storie* (1823) 1 Sim & St 210; *Murray v Parker* (1854) 19 Beav 305; *Fowler v Scottish Equitable Life Insurance Society* (1858) 28 LJCh 225; *Vergottis & Co v H Ford & Co Ltd* (1918) 34 TLR 233; *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA; *Eason v Brownrigg* [1998] 10 CL 425.
- 3 *Murray v Parker* (1854) 19 Beav 305; cf *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA.

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## **61. Matters to be proved before rectification is granted.**

To justify the court correcting a mistake in an instrument, the evidence must be clear and unambiguous ('convincing proof'<sup>1</sup>) that a mistake (whether of fact or law)<sup>2</sup> has been made in recording the parties' intention<sup>3</sup>, what that intention was<sup>4</sup> and that the alleged intention to which it is desired to make the agreement conformable continued concurrently in the parties' minds down to the time of the execution of the instrument<sup>5</sup>. In considering the intentions of a collective body (such as a group of trustees or a committee of a board), it is their collective intention which is relevant for these purposes, although there is no requirement to show evidence of their agreement or accord<sup>6</sup>. Thus the court will not add to a settlement a power which the claimant states that he intended to be added, but to his knowledge was not contained in it when he executed it<sup>7</sup>; nor will the court normally supply a provision which the evidence shows was intentionally omitted<sup>8</sup>. The party seeking to rectify must also be able to show precisely the form to which the deed ought to be altered<sup>9</sup>.

- 1 *Joscelyne v Nissen* [1970] 2 QB 86 at 98, [1970] 1 All ER 1213 at 1222, CA, per Russell LJ; *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Agip SpA v Navigazione Alta*

*Italia SpA, The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353 at 359, CA, per Slade LJ; *Grand Metropolitan plc v William Hill Group Ltd* [1997] 1 BCLC 390 at 394 per Arden J; *Lansing Linde Ltd v Alber* [2000] Pensions LR 15 at 44 per Rimer J; *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [59] per Lawrence Collins J; *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2008] 1 P & CR 187, [2007] All ER (D) 245 (Apr) at [27] per Carnwath LJ.

2 *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483; *Re Slocock's Will Trusts* [1979] 1 All ER 358.

3 *Beaumont v Bramley* (1822) Turn & R 41 at 50 per Lord Eldon LC; *Mortimer v Shortall* (1842) 2 Dr & War 363 at 373 per Sir Edward Burtenshaw Sugden LC; *Parsons v Bignold* (1843) 13 Sim 518; *Rooke v Lord Kensington* (1856) 2 K & J 753; *Fowler v Fowler* (1859) 4 De G & J 250; *Rake v Hooper* (1900) 83 LT 669, 17 TLR 118; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA; *Pukallus v Cameron* (1982) 180 CLR 447 at 457; *Hamed El Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 (affd [1994] 1 Lloyd's Rep 382, CA).

4 *Slee v Warke* (1949) 86 CLR 271; *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd* [1973] 2 Lloyd's Rep 101, CA; *Harlow Development Corp v Kingsgate (Clothing Productions) Ltd* (1973) 226 Estates Gazette 1960; *Crawley Borough Council v Bradford & Bingley Building Society* (23 July 1998, unreported), CA.

5 *Dowager Countess of Shelburne v Earl of Inchiquin* (1784) 1 Bro CC 338 at 341 per Lord Thurlow LC; *Marquis of Townshend v Stangroom* (1801) 6 Ves 328 at 333-334 per Lord Cottenham LC; *Marquess of Breadalbane v Marquess of Chandos* (1837) 2 My & Cr 711 at 739-740 per Lord Cottenham LC; *Marquess of Exeter v Marchioness of Exeter* (1838) 3 My & Cr 321; *Hills v Rowland* (1853) 4 De GM & G 430; *Rooke v Lord Kensington* (1856) 2 K & J 753 at 763-764; *Wright v Goff* (1856) 22 Beav 207 at 214 per Sir John Romilly MR; *Fowler v Fowler* (1859) 4 De G & J 250 at 264, 273 per Lord Chelmsford LC; *Sells v Sells* (1860) 1 Drew & Sm 42; *Bentley v Mackay* (1862) 4 De GF & J 279; *Earl of Bradford v Earl of Romney* (1862) 30 Beav 431; *Re Walsh's Estate* (1867) 15 WR 1115 at 1117 per Brewster C; *Rake v Hooper* (1900) 83 LT 669, 17 TLR 118; *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 at 664, [1971] 1 WLR 1390n at 1391n per Simonds J (affd [1939] 4 All ER 68, CA); *Fredensen v Rothschild* [1941] 1 All ER 430; *Gilhespie v Burdis* (1943) 169 LT 91; *Dormer v Sherman* (1966) 110 Sol Jo 171, CA; *Agip SpA v Navigazione Alta Italia SpA, The Nai Genova and Nai Superba* [1984] 1 Lloyd's Rep 353 at 359, CA, per Slade LJ; *Eason v Brownrigg* [1998] CLY 3659; *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, at [32]-[34] per Peter Gibson LJ; *JIS (1974) Ltd v MCE Investment Nominees Ltd* [2003] EWCA Civ 721, [2003] 24 LS Gaz R 36, [2003] All ER (D) 155 (Apr), at [25] per Carnwath LJ; *James Hay Pension Trustees Ltd v Cooper Estates Ltd* [2005] EWHC 36 (Ch) at [14], [2005] All ER (D) 144 (Jan) at [14] per Hart J; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267, [2009] All ER (D) 12 (Jul).

6 *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [66] per Lawrence Collins J.

7 *Harbridge v Wogan* (1846) 5 Hare 258.

8 *Rake v Hooper* (1900) 83 LT 669, 17 TLR 118; but see PARA 58. Cf *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251, [1976] 2 All ER 483 (where a term was deliberately inserted).

9 *Fowler v Fowler* (1859) 4 De G & J 250; *Earl of Bradford v Earl of Romney* (1862) 30 Beav 431 at 439 per Lord Chelmsford MR; *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 486, CA; *Pukallus v Cameron* (1982) 180 CLR 447; *Eason v Brownrigg* [1998] CLY 3659; *Pappadakis v Pappadakis* (2000) Times, 19 January.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(4) RECTIFICATION/62. Joint contracts.

## 62. Joint contracts.

There is no settled rule in equity that every contract which is in terms joint, and would be so construed at law, is to be treated in equity as joint and several so as to bind the estate of a deceased covenantor<sup>1</sup>. In such a case, therefore, in the absence of any evidence that a deed<sup>2</sup> or cheque<sup>3</sup> was drawn in a form different from that which was the intention of the parties, or that there was an agreement for a covenant of a different sort, there is no ground for imputing a mistake and rectifying the instrument, so as to make it joint and several<sup>4</sup>. However, if it appears that the instrument was made joint instead of joint and several either through fraud or for want

of skill<sup>5</sup>, or, although intended to be joint and several, was drawn by mistake in the form of a joint liability<sup>6</sup>, relief may be granted on equitable grounds.

1 *Sumner v Powell* (1816) 2 Mer 30 at 36 per Sir William Grant MR (affd (1823) Turn & R 423); *Clarke v Bickers* (1845) 14 Sim 639; *Kendall v Hamilton* (1879) 4 App Cas 504, HL. Cf *Thorpe v Jackson* (1837) 2 Y & C Ex 553 (doubted in *Jones v Beach* (1852) 2 De GM & G 886 at 889); *Beresford v Browning*, *Browning v Beresford* (1875) LR 20 Eq 564 at 569 per Sir George Jessel MR (affd 1 ChD 30, CA); and see **CONTRACT** vol 9(1) (Reissue) PARA 1082; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 117.

2 *Sumner v Powell* (1816) 2 Mer 30 (affd (1823) Turn & R 423).

3 *Other v Iveson* (1855) 3 Drew 177 at 181 per Kindersley V-C.

4 See *Rawstone v Parr* (1827) 3 Russ 539.

5 *Simpson v Vaughan* (1739) 2 Atk 31.

6 *Other v Iveson* (1855) 3 Drew 177 at 181 per Kindersley V-C. As to partnership debts see *Sumner v Powell* (1816) 2 Mer 30 at 37 per Sir William Grant MR (affd (1823) Turn & R 423); *Kendall v Hamilton* (1879) 4 App Cas 504 at 517, HL, per Earl Cairns LC.

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### 63. Marriage settlements.

In the case of a marriage settlement where a post-nuptial settlement differs from articles entered into before marriage, the court will apparently always set up the articles<sup>1</sup>. Similarly when an ante-nuptial settlement purports to be in pursuance of articles entered into before marriage and there is any variance, no evidence beyond the articles is necessary in order to have the settlement rectified<sup>2</sup>. There must be clear evidence of the terms of the articles and a mere recital of their terms in a post-nuptial settlement will not enable what has been recited to be set up as against the terms of the settlement itself<sup>3</sup>. Even when the settlement contains no reference to the articles, if it can be shown that the settlement was intended to be in conformity with the articles and there is clear and satisfactory evidence showing that the discrepancy has arisen from mistake, the court will re-form the settlement and make it conformable to the real intention of the parties<sup>4</sup>. Moreover, the court looks at the intention rather than the actual words of the articles, and where a post-nuptial or an ante-nuptial settlement purports to be made in pursuance of ante-nuptial articles, then even though the limitations of the settlement may agree with the words of the articles, if it does not carry out the intent, the court will reform it<sup>5</sup>. Where the settlement carries out the settlor's instructions there is no case for rectification<sup>6</sup>.

Where the husband undertakes the duty of having the marriage settlement prepared as agent for the wife, and the settlement is not such as the court would sanction in the absence of agreement and does not carry out the wife's intention, the settlement may be rectified so as to accord with that intention<sup>7</sup>.

1 *Bold v Hutchinson* (1855) 5 De GM & G 558; *Kent v Brown* (1942) 43 SR(NSW) 124. As to marriage articles see **SETTLEMENTS** vol 42 (Reissue) PARA 628 et seq.

2 *Bold v Hutchinson* (1855) 5 De GM & G 558.

3 *Mignam v Parry* (1862) 31 Beav 211.

4 *Bold v Hutchinson* (1855) 5 De GM & G 558; *King v King-Harman* (1873) 7 IR Eq 446.

5 *Cogan v Duffield* (1875) LR 20 Eq 789 (affd (1876) 2 ChD 44 at 49, CA, per James LJ); and see *Herring-Cooper v Herring-Cooper* [1905] 1 IR 465 (post-nuptial); *Smith v Illiffe* (1875) LR 20 Eq 666 (ante-nuptial).

6 *Constantinidi v Ralli* [1935] Ch 427.

7 *Corley v Lord Stafford* (1857) 1 De G & J 238; *Clark v Girdwood* (1877) 7 ChD 9, CA; *Lovesy v Smith* (1880) 15 ChD 655. As to the rectification of family settlements see *Hoblyn v Hoblyn* (1889) 41 ChD 200; *McCausland v Young* [1949] NI 49. As to family settlements generally see **SETTLEMENTS** vol 42 (Reissue) PARA 1002 et seq.

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## 64. Rectification of a will.

A will differs from an inter vivos document in having to be submitted to probate. In being so submitted, it is possible for parts to be omitted on the basis that the testator did not know or approve of them<sup>1</sup>, though not where the mistake arose because the draftsman misunderstood the testator's intentions or used language which failed to give effect to them<sup>2</sup>. However, before the question of want of knowledge and approval can arise, the will must be construed according to its apparent terms<sup>3</sup>.

Once the construction process is complete, the court may consider rectification. Until 1982<sup>4</sup>, the court's power to rectify a will was limited<sup>5</sup>. It could not insert words<sup>6</sup>, but it could strike them out<sup>7</sup>, on the ground of want of knowledge and approval<sup>8</sup>. The will could then be construed again in light of the version admitted to probate<sup>9</sup>.

Since 1982 the law has been liberalised. A will may be rectified if the court is satisfied that it is so expressed as to fail to carry out the testator's intentions, in consequence of a clerical error or a failure to understand his instructions<sup>10</sup>. Except with the leave of the court, the application for rectification must be made within six months of the grant of probate or administration<sup>11</sup>. A personal representative will not be liable for having distributed any part of the estate of the deceased after the six month period on the ground that he ought to have taken into account the possibility that the court might thereafter give leave to make such application<sup>12</sup>.

The standard of proof required for rectification is the balance of probabilities, but to overcome the written form of the will convincing evidence is necessary<sup>13</sup>.

1 *Morrell v Morrell* (1882) 7 PD 68; *Re Walkeley's Goods* (1893) 69 LT 419.

2 *Harter v Harter* (1873) LR 3 P & D 11; *Collins v Elstone* [1893] P 1.

3 *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037 at 1039, [1976] 1 WLR 161 at 164. As to the construction of wills see PARA 37; and **WILLS** vol 50 (2005 Reissue) PARA 336 et seq.

4 *le* prior to the enactment of the Administration of Justice Act 1982 (see the text to notes 10-12).

5 See *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037, [1976] 1 WLR 161.

6 *Guardhouse v Blackburn* (1866) LR 1 P & D 109, 114; *Re Schott's Goods* [1901] P 190, 192.

7 *Re Schott's Goods* [1901] P 190; *Re Horrocks, Taylor v Kershaw* [1939] P 198, [1939] 1 All ER 579, CA.

8 *Re Boehm's Goods* [1891] P 247; *Re Morris* [1971] P 62, [1970] 1 All ER 1057; *Re Phelan* [1972] Fam 33, [1971] 3 All ER 1256.

9 *Re Morris* [1971] P 62, [1970] 1 All ER 1057; *Re Reynette-James, Wightman v Reynette-James* [1975] 3 All ER 1037, [1976] 1 WLR 161.



10 Administration of Justice Act 1982 s 20(1); and see **WILLS** vol 50 (2005 Reissue) PARA 408. 'Clerical error' means an inadvertent error in the process of recording the intended words of the testator in the drafting or transcription of his will: *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch 412, [1992] 3 All ER 204 (an omission from an updated will of a clause from an earlier will held to constitute a clerical error). See also *Re Segelman* [1996] Ch 171, [1995] 3 All ER 676 (a draftsman's failure to appreciate the significance or effect of words is capable of being a clerical error).

11 Administration of Justice Act 1982 s 20(2); and see **WILLS** vol 50 (2005 Reissue) PARA 408.

12 Administration of Justice Act 1982 s 20(3); and see **WILLS** vol 50 (2005 Reissue) PARA 408.

13 *Re Segelman* [1996] Ch 171 at 184, [1995] 3 All ER 676 at 684 per Chadwick J; *Walker v Geo H Medlicott & Son* [1999] 1 All ER 685, [1999] 1 WLR 727, CA.

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## 65. Voluntary instruments.

A voluntary deed as well as a settlement for value may be re-formed or rectified in a proper case<sup>1</sup>. If the grantor agrees, the court may rectify a voluntary deed by setting aside a part of it only and allowing the remainder to stand<sup>2</sup>; if the grantor does not agree, the instrument can only be set aside<sup>3</sup>. The same follows where the deed fails in substance to carry out the parties' intention<sup>4</sup>. A grantor may make a fresh deed and, with the grantee's consent, cancel the old one, but he cannot be compelled to alter the grant, and, if the grantor contests it, the deed must stand or fall in its actual condition without alteration<sup>5</sup>. Even if the evidence shows that the grantor did intend otherwise than as expressed in the deed, the court will not compel him now to introduce a clause into the deed which he does not choose to introduce, for there can be no specific performance of an intention to make a voluntary deed<sup>6</sup>. Generally speaking there can be no rectification without the grantor's consent<sup>7</sup>, but after his death rectification can be sought, on proof that the instrument did not carry his intention into effect<sup>8</sup>.

If a settlement does not involve an actual bargain between the settlor and the trustees, the settlor may seek rectification on proof that it does not express his true intention or the true intention of himself and any party with whom he has bargained; he need not show failure to express the trustees' intention<sup>9</sup>. Where a deed is made in exercise of a power by more than one person, it is the collective intention that must be objectively manifested<sup>10</sup>. On the other hand the court will hesitate to rectify a voluntary settlement at the settlor's instance merely on his own evidence as to his intention, unsupported by other evidence such as written instructions<sup>11</sup>, even though the rectification sought would bring the settlement more into harmony with recognised precedents and what the settlor might reasonably have intended at the time<sup>12</sup>. However, a volunteer is entitled to take proceedings to have an error in a settlement rectified<sup>13</sup>, even though the effect would be to carry back the settled fund to the original settlor<sup>14</sup>, but the court will only act on the clearest and most certain demonstration of error and of actual intention<sup>15</sup>.

The court will not rectify a settlement which the settlor intended to execute, but where he mistakenly believed that the fiscal consequences of making such a settlement were different from what they actually were, as the settlement correctly recorded his intentions<sup>16</sup>.

1 *Walker v Armstrong* (1856) 8 De GM & G 531; *Bonhote v Henderson* [1895] 1 Ch 742 (affd [1895] 2 Ch 202, CA); *Behrers v Heilbut* (1956) 222 LT Jo 290; *Re Butlin's Settlement Trusts*, *Butlin v Butlin* [1976] Ch 251 at 260, [1976] 2 All ER 483 at 487 per Brightman J; *Re Slocock's Will Trusts* [1979] 1 All ER 358. As to the revocation and avoidance of gifts see **GIFTS** vol 52 (2009) PARA 257 et seq.

2 *Turner v Collins* (1871) 7 Ch App 329 at 342 per Lord Hatherley LC.

- 3 *Phillipson v Kerry* (1863) 32 Beav 628 at 637-638 per Sir John Romilly MR; *Turner v Collins* (1871) 7 Ch App 329 at 342 per Lord Hatherley LC.
- 4 *Phillipson v Kerry* (1863) 32 Beav 628.
- 5 *Broun v Kennedy* (1863) 33 Beav 133 at 147 per Sir John Romilly MR (on appeal (1864) 4 De GJ & Sm 217); and see *Phillipson v Kerry* (1863) 32 Beav 628 at 637-638 per Sir John Romilly MR.
- 6 *Lister v Hodgson* (1867) LR 4 Eq 30 at 34, 36 per Sir John Romilly MR; *Thompson v Whitmore* (1860) 1 John & H 268 at 273 per Sir W Page Wood V-C; *M'Mechan v Warburton* [1896] 1 IR 435; cf *Weir v Van-Tromp* (1900) 16 TLR 531.
- 7 *Tucker v Bennett* (1887) 38 ChD 1 at 14-15, CA, per Cotton LJ; *Rake v Hooper* (1900) 83 LT 669, 17 TLR 118.
- 8 *Lister v Hodgson* (1867) LR 4 Eq 30, 34; *Weir v Van Tromp* (1900) 16 TLR 531 (claim for rectification dismissed); *Christie v Public Trustee* (1921) 22 SR(NSW) 148.
- 9 *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] Ch 251 at 262, [1976] 2 All ER 483 at 489 per Brightman J; *Tankel v Tankel* [1999] 1 FLR 676.
- 10 *AMP (UK) Ltd plc v Barker* (2000) 3 ITELR 414 at [64]-[67] per Lawrence Collins J; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at [117], [2005] All ER (D) 177 (Jan) at [117] per Etherton J; *Lansing Linde Ltd v Alber* [2000] Pensions LR 15 at 49-50 per Rimer J.
- 11 *Van der Linde v Van der Linde* [1947] Ch 306.
- 12 *Bonhote v Henderson* [1895] 1 Ch 742 (affd [1895] 2 Ch 202, CA); *Tankel v Tankel* [1999] 1 FLR 676.
- 13 *Thompson v Whitmore* (1860) 1 John & H 268 at 273 per Sir W Page Wood V-C; *Weir v Van Tromp* (1900) 16 TLR 531; *Re Slocock's Will Trusts* [1979] 1 All ER 358.
- 14 *Thompson v Whitmore* (1860) John & H 268.
- 15 *Weir v Van Tromp* (1900) 16 TLR 531; *Re Slocock's Will Trusts* [1979] 1 All ER 358.
- 16 *Allnutt v Wilding* [2007] EWCA Civ 412, 9 ITELR 806, [2007] All ER (D) 41 (Apr).

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## 66. Settlements under a court order.

It is no objection to the exercise by the court of its jurisdiction that the settlement was made in pursuance of a court order<sup>1</sup>. Consent orders may be set aside, wholly or in part, or rectified on such grounds as would enable the court to set aside or rectify an agreement, for example, fraud or mutual mistake<sup>2</sup>.

The fact that a provision is proper, and one usually inserted in marriage settlements directed by the court, is not a ground for refusing to rectify the settlement by striking the provisions out when it is shown that its insertion defeats the intention<sup>3</sup>.

- 1 *Smith v Illiffe* (1875) LR 20 Eq 666.
- 2 *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, CA; *Wilding v Sanderson* [1897] 2 Ch 534, CA; *Standley v Stewkesbury* [1998] 2 FLR 610, CA.
- 3 *Torre v Torre* (1853) 1 Sm & G 518.

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## 67. Effect of rectification.

Rectification, if granted, relates back to the time when the instrument was executed<sup>1</sup>, and after rectification the instrument is to be read as if it had been originally drawn up in its rectified form<sup>2</sup>. When rectified, a contract becomes a document sufficient to satisfy any statutory provision requiring the existence of a document in writing<sup>3</sup>.

1 *Earl of Malmesbury v Countess of Malmesbury* (1862) 31 Beav 407 at 418 per Sir John Romilly MR.

2 *Craddock Bros v Hunt* [1923] 2 Ch 136 at 151, CA, per Lord Sterndale MR. See also *Re Slocock's Will Trusts* [1979] 1 All ER 358 at 363 per Graham J.

3 See PARA 48.

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## 68. Practice.

All causes and matters for rectification of deeds or other written instruments are assigned to the Chancery Division of the High Court<sup>1</sup>. However, a counterclaim for rectification may be entertained in the Queen's Bench Division<sup>2</sup>, and rectification has been granted in judicial review proceedings in the Administrative Court<sup>3</sup>. Certain proceedings for rectification may also be taken in the county court subject to the limits on its equity jurisdiction<sup>4</sup>. Normally a claim for rectification must be specifically pleaded, but the court may grant the relief even though it is not asked for on the pleadings<sup>5</sup>. An instrument may be rectified even though a party to it is not joined or before the court where that party is not affected by the rectification<sup>6</sup>. However, so long as an instrument remains unaltered the court cannot avoid acting on it in that form<sup>7</sup>.

Generally, in proceedings for rectification, oral evidence is required to be given; trial on affidavit evidence will not be ordered<sup>8</sup>. But when the issues of fact substantially depend on written evidence and no objection is made by either party, the court may decide the case on affidavit evidence<sup>9</sup> and proceedings to obtain rectification may then be commenced<sup>10</sup>.

Where a conveyance is ordered to be rectified, the court order is sufficient without a further conveyance<sup>11</sup>. Sometimes the judge will authenticate the alteration by signing his initials against it<sup>12</sup>, but this is not necessary<sup>13</sup>. The usual course is to direct the declaration made by the court to be indorsed on the instrument<sup>14</sup>. A conveyance is sometimes directed<sup>15</sup>.

1 See the Senior Courts Act 1981 s 61(1), Sch 1 para 1(g); and **COURTS** vol 10 (Reissue) PARA 611. As to the renaming of the Senior Courts Act 1981 see PARA 2 note 8. As to the assignment of proceedings in the High Court generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 43 et seq. As to the consequences of commencing proceedings in the wrong division see *Apac Rowena Ltd v Norpol Packaging Ltd* [1991] 4 All ER 516. As to the rectification or setting aside of deeds generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 67 et seq.

2 *Mostyn v West Mostyn Coal and Iron Co Ltd* (1876) 1 CPD 145; *Storey v Waddle* (1879) 4 QBD 289, CA; *Hamed El Chiaty & Co (t/a Travco Nile Cruise Lines) v Thomas Cook Group Ltd, The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 (affd [1994] 1 Lloyd's Rep 382, CA).

- 3 *R v Inspector of Taxes, ex p Bass Holdings Ltd, Richart (Inspector of Taxes) v Bass Holdings Ltd* [1993] STC 122. As to the Administrative Court (formerly the Crown Office List) see **COURTS** vol 10 (Reissue) PARA 614. As to judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq.
- 4 See **COURTS** vol 10 (Reissue) PARA 719.
- 5 *Butler v Mountview Estates Ltd* [1951] 2 KB 563 at 571, [1951] 1 All ER 693 at 700 per Danckwerts J.
- 6 *Wilson v Wilson* [1969] 3 All ER 945 at 948, [1969] 1 WLR 1470 at 1473 per Buckley J.
- 7 *Re Malet* (1862) 30 Beav 407 at 408 per Sir John Romilly MR.
- 8 *Bonhote v Henderson* [1895] 1 Ch 742 (affd [1895] 2 Ch 202, CA); *Constantinidi v Ralli* [1935] Ch 427.
- 9 See *Bonhote v Henderson* [1895] 1 Ch 742 (affd [1895] 2 Ch 202, CA); *Re Colebrook's Conveyances, Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397; *Seymour v Seymour* (1989) Times, 16 February; *Lake v Lake* [1989] STC 865.
- 10 As to the bringing of proceedings see CPR Pt 8; and **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq. Where the Pt 8 procedure cannot be used, the procedure set out in Pt 7 will apply: see **CIVIL PROCEDURE** vol 11 (2009) PARA 116 et seq.
- 11 *White v White* (1872) LR 15 Eq 247; *Beale v Kyte* [1907] 1 Ch 564; and see *Stock v Vining* (1858) 25 Beav 235.
- 12 *Stock v Vining* (1858) 25 Beav 235.
- 13 *White v White* (1872) LR 15 Eq 247 at 249 per Sir James Bacon V-C.
- 14 See *Hanley v Pearson* (1879) 13 ChD 545 at 549 per Sir James Bacon V-C; *Johnson v Bragge* [1901] 1 Ch 28 at 37 per Cozens-Hardy J; *Lord Gifford v Lord Fitzhardinge* [1899] 2 Ch 32; *Re BT Property Trust* (31 March 1998, unreported), NSW SC.
- 15 *Earl of Malmesbury v Countess of Malmesbury, Phillipson v Turner* (1862) 31 Beav 407; *Clark v Malpas* (1862) 4 De GF & J 401; cf *Marquess of Exeter v Marchioness of Exeter* (1838) 3 My & Cr 321 at 326 per Lord Cottenham LC. See also *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470.

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## **(5) RECOVERY OF MONEY PAID UNDER A MISTAKE**

### **(i) At Common Law**

#### **69. Introduction.**

The law relating to recovery of mistaken payments has a long history, going back to the so-called 'common counts' for money had and received to the use of the plaintiff<sup>1</sup>, and before that to the old law of account<sup>2</sup>. Along with quantum meruit, quantum valebat, and other counts, it became a part of the law known as quasi-contract<sup>3</sup>, which has now developed into the law of restitution<sup>4</sup>, the central principle of which is the reversal of unjust enrichment<sup>5</sup>. Under the umbrella of this principle, other areas of both common law and equity have been united with that relating to money paid under mistake. Most recently, the rule forbidding the recovery of money paid under a mistake of law has been abandoned, so that henceforth a mistaken payment may in principle be recovered, whether the mistake was of fact or law<sup>6</sup>. This rapid development means that most of the older authorities on the subject have only limited relevance for the future<sup>7</sup>.

- 1 *Bonnel v Fowke* (1657) 2 Sid 4; 3 Bl Com 162; Simpson *A History of the Common Law of Contract* (1st Edn, 1975) pp 494-495.
- 2 *Framson v Delamere* (1595) Cro Eliz 458; *Hewer v Bartholomew* (1598) Cro Eliz 614; 8 Holdsworth's *History of English Law* (7th Edn) p 92.
- 3 Baker 'The History of Quasi-Contract in English Law' in Cornish (ed) *Restitution, Past, Present and Future* (1998).
- 4 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 196-197, [1992] 3 All ER 737 at 780-781, HL, per Lord Browne-Wilkinson; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961, HL; cf *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL.
- 5 Birks *An Introduction to the Law of Restitution* (2nd Edn, 2005) ch I; Birks *Unjust Enrichment* (2nd Edn, 2005); and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 1 et seq.
- 6 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; and PARA 71.
- 7 As to restitution and mistake see further **RESTITUTION** vol 40(1) (2007 Reissue) PARA 28 et seq.

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## 70. General rules.

The early authorities held that only a payment made under a mistake of fact going to liability, whether to the payee<sup>1</sup> or to a third party<sup>2</sup>, could be recovered. This was held to extend to mistakes about future liability<sup>3</sup>, and mistakes about liability in equity<sup>4</sup>. In one case it was even held that the payment could be recovered where the mistake went to a moral rather than legal liability<sup>5</sup>.

In recent times the rule has been stated more widely, in terms of money paid under a 'fundamental' mistake<sup>6</sup>, and even in terms of payment caused by mistake<sup>7</sup> (subject to defences<sup>8</sup>), provided that the necessary elements of unjust enrichment are established<sup>9</sup>. However, there are also modern authorities applying the older test based on a mistake going to liability<sup>10</sup>, which some writers<sup>11</sup> and judges<sup>12</sup> have rationalised as based on the fact of there having occurred a total failure (or at any rate absence) of consideration<sup>13</sup>.

- 1 *Bize v Dickason* (1786) 1 Term Rep 285 at 287 per Lord Mansfield; *Kelly v Solari* (1841) 9 M & W 54; *Standish v Ross* (1849) 3 Exch 527; *Aiken v Short* (1856) 1 H & N 210 at 215, per Bramwell B; *Clough v Henry* (1894) 10 TLR 603; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 28 et seq.
- 2 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL.
- 3 *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJBK 465, 105 LT 721, HL.
- 4 *Kleinwort Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL.
- 5 *Larner v LCC* [1949] 2 KB 683, [1949] 1 All ER 964, CA; cf *Morgan v Ashcroft* [1938] 1 KB 49 at 66-67, [1937] 3 All ER 92 at 98-99, CA, per Sir Wilfrid Green MR.
- 6 *Norwich Union Fire Insurance Society Ltd v WH Price Ltd* [1934] AC 455 at 462-463, PC; *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA; *Ayres v Moore* [1940] 1 KB 278, [1939] 4 All ER 351; *Porter v Latec Finance (Queensland) Ltd* (1964) 111 CLR 177 at 187; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 376.
- 7 *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677 at 696, [1979] 3 All ER 522 at 536 per Goff J; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249.

8 See PARAS 74-76.

9 *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 77 P & CR 66, CA.

10 *Avon County Council v Howlett* [1983] 1 All ER 1073 at 1082-83, [1983] 1 WLR 605 at 617, CA, per Slade LJ; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423, [1989] 1 WLR 912, CA; *IVS Enterprises Ltd v Chelsea Cloisters Management Ltd* [1994] EGCS 14, 13 TLI 111.

11 Butler 'Mistaken Payments, Change of Position and Restitution' in Finn (ed) *Essays on Restitution* (1990).

12 *Baker v Courage & Co* [1910] 1 KB 56 at 65 per Hamilton J; *Rover International Ltd v Cannon Film Sales Ltd (No 3)* [1989] 3 All ER 423 at 433, [1989] 1 WLR 912 at 923-924 per Kerr LJ; *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 166, 197, [1992] 3 All ER 737 at 754, 780, HL, per Ralph Gibson LJ; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 924-930 per Hobhouse J (on appeal [1994] 4 All ER 890 at 960, [1994] 1 WLR 938 at 944, CA, per Dillon LJ, and at 968 and 952-953 per Leggatt LJ; [1996] AC 669, [1996] 2 All ER 961, HL); *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 at 976 per Hobhouse J; *Friends' Provident Life Office v Hillier Parker May & Rowden* [1997] QB 85, [1995] 4 All ER 260, CA; *Guinness Mahon v Kensington and Chelsea Borough Council* [1999] QB 215 at 239-240, [1998] 2 All ER 272 at 294, CA, per Morritt LJ; *Rochester upon Medway City Council v Kent County Council* (1998) 96 LGR 697.

13 As to total failure of consideration see **CONTRACT** vol 9(1) (Reissue) PARA 992; **RESTITUTION** vol 40(1) (2007 Reissue) PARA 87 et seq.

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## 71. Money paid under mistake of law.

Formerly the general rule was that money paid under mistake of law was irrecoverable at common law<sup>1</sup>, but the scope of the rule was narrowed by classifying certain mistakes as mistakes of fact, including mistakes of foreign law<sup>2</sup>, mistakes relating to the construction of agreements<sup>3</sup> or private Acts<sup>4</sup>, and mistakes as to private rights<sup>5</sup>. Moreover, a number of exceptions to the general rule were established, relating to payments made to<sup>6</sup> and by<sup>7</sup> officers of the court, by personal representatives<sup>8</sup> and (perhaps) liquidators<sup>9</sup>, and where the payer was not in *pari delicto*<sup>10</sup> with the payee<sup>11</sup>.

The rule has now been abrogated in English law<sup>12</sup>, creating certain difficulties for the future<sup>13</sup>. In principle, however, money paid under mistake of law is now to be treated in the same way as money paid under mistake of fact<sup>14</sup>. The suggestion that this rule did not extend to an overpayment of tax under a mistake of law<sup>15</sup> has been rejected<sup>16</sup>; but if Parliament creates a statutory regime which is inconsistent with this common law right, that right is displaced<sup>17</sup>. However, the rule does not apply to the recovery by the state of overpayments of social security benefits made by mistake, at least where there is a comprehensive statutory regime prescribing all the incidents of the benefits to which it applies and the circumstances in which repayments are to be made<sup>18</sup>.

There is no 'settled law' defence to a claim for repayment of money paid under a mistake of law<sup>19</sup>, but this position may be modified by statute<sup>20</sup>.

1 *Lowry v Bourdieu* (1780) 2 Doug KB 468; *Bilbie v Lumley* (1802) 2 East 469; *Brisbane v Dacres* (1813) 5 Taunt 143; *Wilson v Sinclair* (1830) 4 Wils & S 398; *Harse v Pearl Life Assurance Co* [1904] 1 KB 558, CA; *William Whiteley Ltd v McGregor* (1909) 101 LT 741; *Re Hatch, Hatch v Hatch* [1919] 1 Ch 351.

2 See PARA 10.

3 See PARA 10.

- 4 *Cooper v Phibbs* (1867) LR 2 HL 149.
- 5 *Anglo-Scottish Beet Sugar Corpn Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; and see PARA 10.
- 6 *Re Condon, ex p James* (1874) 9 Ch App 609, CA; *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 543, [1974] 1 WLR 1097 at 1105 per Templeman J; *Re Clark (a bankrupt), ex p trustee of the property of the bankrupt v Texaco Ltd* [1975] 1 All ER 453, [1975] 1 WLR 559.
- 7 *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch 91.
- 8 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.
- 9 *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401.
- 10 It is not equally at fault: see **CONTRACT** vol 9(1) (Reissue) PARA 880.
- 11 *Kiriri Cotton Co v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC; *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430; and see **CONTRACT** vol 9(1) (Reissue) PARA 885.
- 12 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL; *Nuridin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249.
- 13 See PARA 11.
- 14 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL.
- 15 See *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL, at 381-382 and 537-538 per Lord Goff of Chieveley; *Woolwich Equitable Building Society v IRC* [1993] AC 70, sub nom *Woolwich Building Society v IRC (No 2)* [1992] 3 All ER 737, HL.
- 16 *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449, at [18]-[19], [23] per Lord Hoffmann, at [56] per Lord Hope of Craighead, at [83] per Lord Scott of Foscote and at [132]-[135], [141] per Lord Walker of Gestingthorpe.
- 17 See *Monro v Revenue and Customs Comrs* [2008] EWCA Civ 306, [2009] Ch 69, [2008] All ER (D) 126 (Apr), in which it was also held that the particular statutory restriction on the right of recovery was not an unjustified interference with the right to protection of property under the European Convention on Human Rights First Protocol art 1. As to the right to property protected under the European Convention on Human Rights First Protocol art 1 see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 165.
- 18 *R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWCA Civ 1058, (2009) Times, 21 October, [2009] All ER (D) 135 (Oct).
- 19 *Deutsche Morgan Grenfell Group plc v IRC* [2005] EWCA Civ 78, [2006] Ch 243, [2005] STC 329, at [237], per Jonathan Parker LJ; *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449, at [18], [46]-[49] per Lord Hoffmann, at [145] per Lord Walker of Gestingthorpe.
- 20 See *Monro v Revenue and Customs Comrs* [2008] EWCA Civ 306, [2009] Ch 69, [2008] All ER (D) 126 (Apr).

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## 72. Other points relating to recovery of mistaken payments.

If the payment is made out and out, whether as a gift<sup>1</sup>, or where the payer intends that the payee shall have the money at all events<sup>2</sup>, or where the law imposes that conclusion on the payment (as with the payment of gambling debts<sup>3</sup>), there can be no claim.

Where the payee is the agent of a third party, the payer may probably sue him personally for recovery of a mistaken payment until he has paid it over or otherwise accounted for it to his

principal<sup>4</sup>, after which it is clear that the claim lies only against the principal<sup>5</sup>. The principal, however, is always liable<sup>6</sup>.

As a general rule, negligence by the payer, for example in having the means of knowledge of the mistake, is irrelevant to liability<sup>7</sup>.

In order for a payment made under mistake of law to be recoverable, the claimant is not required to establish that he had mistakenly believed himself liable to make the payment, only that he would not have made the payment but for the mistake<sup>8</sup>. There is no duty on a payer who pays money by mistake to mitigate his loss<sup>9</sup>.

Where the right of recovery applies, it may be exercised by way of set-off, even in public law cases, where there can be set-off against future payments otherwise due<sup>10</sup>. Where the recipient is ordered to repay money paid under a mistake, the court will normally in the exercise of its discretion also order the payment of interest by way of compensation to the payer, though not necessarily as from the date of the mistaken payment<sup>11</sup>.

The right to obtain a refund in respect of overpaid value added tax is not a directly effective European Union (EU) law right to which EU law principles attach, but a domestic right<sup>12</sup>.

1 *Wilson v Thornbury* (1875) 10 Ch App 239 at 248-249, CA, per Sir WM James LJ.

2 *Kelly v Solari* (1841) 9 M & W 54, 59; *Wason v Wareing* (1852) 15 Beav 151; *Townsend v Crowdy* (1860) 8 CBNS 477 at 490, 494 per Erle CJ; *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J.

3 *Morgan v Ashcroft* [1938] 1 KB 49, [1937] 3 All ER 92, CA; cf *R v Gilks* [1972] 3 All ER 280, [1972] 1 WLR 1341, CA.

4 *Buller v Harrison* (1777) 2 Cowp 565; *Cox v Prentice* (1815) 3 M & S 344; *British American Continental Bank v British Bank for Foreign Trade* [1926] 1 KB 328, CA; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263, HL; cf *Ellis v Goulton* [1893] 1 QB 350, CA.

5 *Baylis v Bishop of London* [1913] 1 Ch 127, CA; *Continental Caoutchouc and Gutta Percha Co v Kleinwort, Sons & Co* (1904) 90 LT 474, CA; *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 207, CA; and see **AGENCY** vol 1 (2008) PARAS 162-163; **RESTITUTION** vol 40(1) (2007 Reissue) PARA 169.

6 *Coulthurst v Sweet* (1866) LR 1 CP 649; *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 207, CA, per Millett LJ.

7 *Lucas v Worswick* (1833) 1 Mood & R 293; *Kelly v Solari* (1841) 9 M & W 54; *Townsend v Crowdy* (1860) 8 CBNS 477; *Brownlie v Campbell* (1880) 5 App Cas 925 at 952, HL, per Lord Blackburn; *Deutsche Bank (London) Agency v Beriro & Co* (1895) 73 LT 669, CA; *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670, HL; *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335; *Secretary of State for Employment v Wellworthy Ltd (No 2)* [1976] ICR 13.

8 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249.

9 *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 at 395, 399, [1996] 4 All ER 733 at 744, 748, CA, per Morritt LJ.

10 *R v Secretary of State for the Environment, ex p Camden London Borough Council* (1995) 28 HLR 321.

11 *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941, [1999] 1 WLR 1249.

12 *Marks & Spencer plc v Customs and Excise Comrs* [1999] 1 CMLR 1152, [1999] STC 205. As to the principle of direct effect of European Union law see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 24.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(5) RECOVERY OF MONEY PAID UNDER A MISTAKE/(i) At Common Law/73. Demand before making claim.



### 73. Demand before making claim.

Where money is paid by one party to another under a mistake of fact common to both parties, it is not necessary for the payer on discovering the mistake to make a demand for payment before making a claim against the payee to recover the money<sup>1</sup>. Where, however, payment was made after the payer had discovered the mistake on which the sum payable was calculated and the payer gave notice of the mistake to the payee, a demand for payment was held necessary<sup>2</sup>.

1 *Baker v Courage & Co* [1910] 1 KB 56; *Anglo-Scottish Beet Sugar Corpn Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335.

2 *Freeman v Jeffries* (1869) LR 4 Exch 189 at 200 per Kelly CB.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(5) RECOVERY OF MONEY PAID UNDER A MISTAKE/(i) At Common Law/74. Defences: limitation and estoppel.

### 74. Defences: limitation and estoppel.

Mere delay on the part of the claimant is not a defence<sup>1</sup>. The limitation period applicable to a claim to recover a mistaken payment at law is six years<sup>2</sup>, and in respect of claims to the personal estate of a deceased person it is 12 years<sup>3</sup>. In either case time begins to run, *prima facie*, from the date of the mistaken payment<sup>4</sup>, but subject to the rule that time will not begin to run until the mistake that led to the payment was, or should with reasonable diligence have been, discovered<sup>5</sup>. Where the discovery of a mistake is the result of judicial interpretation of a statutory provision, the date of discovery for these purposes is the date of the decision<sup>6</sup>. A restitutionary claim for money paid under mistake of fact can in some circumstances amount to a claim in respect of damage under the statutory provisions which require a tortfeasor to recover contribution from any other person who is liable in respect of the same damage<sup>7</sup>, and hence is subject to the two year time limit for contribution claims<sup>8</sup>.

Estoppel can be a defence to a claim to recover money paid under a mistake<sup>9</sup>. Where the payer represents that the payee is entitled to the payment, and the payee relies to his detriment on that representation, the payer will be estopped from denying the payee's entitlement<sup>10</sup>. Normally, payment without more is not a representation of entitlement, though in rare cases it can amount to such a representation<sup>11</sup>. Spending the money paid in ordinary living expenses can amount to detrimental reliance<sup>12</sup>. Where estoppel applies, it is a complete defence and (for example, in cases of partial spending) does not merely operate *pro tanto*<sup>13</sup>, unless the detriment suffered is so disproportionate to the payment received as to make it clearly inequitable or unconscionable for the recipient to retain the balance in his hands<sup>14</sup>.

1 *Clifton v Cockburn* (1834) 3 My & K 76; *Durrant v Ecclesiastical Comrs* (1880) 6 QBD 234.

2 Limitation Act 1980 s 5; *Re Diplock, Diplock v Wintle* [1948] Ch 465 at 514, [1948] 2 All ER 318 at 343, CA, per Lord Greene MR (affd sub nom *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 at 942-943 per Hobhouse J (on appeal [1994] 4 All ER 890, [1994] 1 WLR 938, CA; revsd [1996] AC 669, [1996] 2 All ER 961, HL). See further **LIMITATION PERIODS** vol 68 (2008) PARA 952 et seq.

3 See the Limitation Act 1980 s 22(a); and **LIMITATION PERIODS** vol 68 (2008) PARA 1162.

4 See the Limitation Act 1980 ss 5, 22(a).

- 5 See the Limitation Act 1980 s 32(1)(c); and **LIMITATION PERIODS** vol 68 (2008) PARAS 1230-1231. As to the meaning of 'reasonable diligence' see *Peco Arts Inc v Hazlitt Gallery Ltd* [1983] 3 All ER 193, [1983] 1 WLR 1315; and **LIMITATION PERIODS** vol 68 (2008) PARA 1223. Under the Statute of Limitations (ie the Limitation Act 1963), there was no corresponding provision concerning mistake: see *Baker v Courage & Co* [1910] 1 KB 56; *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607, [1937] 3 All ER 335.
- 6 *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558, [2007] 1 All ER 449.
- 7 See the Civil Liability (Contribution) Act 1978 s 1; see **DAMAGES** vol 12(1) (Reissue) PARA 837 et seq; **TORT** vol 45(2) (Reissue) PARA 349 et seq.
- 8 See the Limitation Act 1980 s 10 (which is subject to the provisions of s 32); *Friends' Provident Life Office v Hillier Parker, May & Rowden* [1997] QB 85, [1995] 4 All ER 260, CA; and **LIMITATION PERIODS** vol 68 (2008) PARAS 1006-1007.
- 9 See also PARA 75.
- 10 *Skyring v Greenwood* (1825) 4 B & C 281 at 290-291; *Mercantile Bank of India Ltd v Central Bank of India Ltd* [1938] AC 287, [1938] 1 All ER 52, PC; *Weld-Blundell v Synott* [1940] 2 KB 107, [1940] 2 All ER 580; *United Overseas Bank v Jiwani* [1977] 1 All ER 733 at 737, 739, [1976] 1 WLR 964 at 968, 970 per Mackenna J; *Avon County Council v Howlett* [1983] 1 All ER 1073 at 1088, [1983] 1 WLR 605 at 623, CA, per Slade LJ.
- 11 *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 at 696, HL, per Lord Sumner.
- 12 *Deutsche Bank (London Agency) v Beriro & Co* (1895) 73 LT 669, CA; *Holt v Markham* [1923] 1 KB 504, CA; *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA; cf *United Overseas Bank v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964.
- 13 *Avon County Council v Howlett* [1983] 1 All ER 1073 at 1088, [1983] 1 WLR 605 at 624, CA, per Slade LJ; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 170.
- 14 *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 2 All ER (Comm) 274, [2001] 3 All ER 818; *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970, [2002] QB 1286, [2002] 1 All ER 198.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(5) RECOVERY OF MONEY PAID UNDER A MISTAKE/(i) At Common Law/75. Defences: change of position and passing on.

## 75. Defences: change of position and passing on.

It appears that the defence of estoppel<sup>1</sup> has now been largely supplanted by the defence of change of position in good faith<sup>2</sup>. The main area where estoppel is accepted still to provide a better defence is where a defendant has relied on a representation by the claimant to change his position only in part<sup>3</sup>, although the scope of this defence remains to be settled and continues to develop on a case by case basis<sup>4</sup>. It is clear that a recipient who has actual knowledge of the mistake, and hence is not in good faith, cannot rely on the defence<sup>5</sup>; but it is also clear that the defence is in principle confined to changes which take place after receipt of the payment<sup>6</sup>. In order to show change of position, a recipient must suffer prejudice which is more than merely trivial if the defence is to be allowed<sup>7</sup>.

The defence of passing on may arise where a claimant who has paid sums (usually tax) to a defendant thereafter claims to recover them, for example, as money paid under mistake<sup>8</sup>. The defence is that the claimant has been able to pass on the liability to a third party (usually the claimant's own customer), on terms that the claimant need not reimburse the third party if it successfully recovers the sums from the defendant. Thus the defendant claims that for the claimant to recover will result in a windfall for the claimant. It has been accepted as a defence in Canada<sup>9</sup>, left open in the House of Lords<sup>10</sup>, but rejected in Australia<sup>11</sup> and in the English Court of Appeal<sup>12</sup>.

1 See PARA 74.

2 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; *David Securities Pty Ltd v Commonwealth Bank of Australia Ltd* (1992) 175 CLR 353 at 384; *State Bank of New South Wales v Swiss Bank* (1995) 39 NSWLR 350; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 166 et seq.

3 Cf *Avon County Council v Howlett* [1983] 1 All ER 1073 at 1087-1088, [1983] 1 WLR 605 at 622-624, CA, per Slade LJ.

4 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 558, 580, [1992] 4 All ER 512 at 516, 534, HL, per Lord Bridge of Harwich.

5 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580, [1992] 4 All ER 512 at 534, HL, per Lord Goff of Chieveley; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985, [2004] 1 All ER (Comm) 193.

6 *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545.

7 *Nuridin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941 at 957 per Neuberger J.

8 As to money paid under a mistake of law see PARA 71.

9 *Air Canada v British Columbia* (1989) 59 DLR (4th) 161.

10 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 177-178, [1992] 3 All ER 737 at 764, HL, per Lord Goff of Chieveley.

11 *Comr of State Revenue v Royal Insurance Australia Ltd* (1994) 126 ALR 1, Aus HC.

12 *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, [1996] 4 All ER 733, CA; see also *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 at 985 per Hobhouse J; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 172. Cf *Marks & Spencer plc v Customs and Excise Comrs* [1999] 1 CMLR 1152, [1999] STC 205.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(5) RECOVERY OF MONEY PAID UNDER A MISTAKE/(i) At Common Law/76. Defences: bona fide purchase and payment for consideration.

## **76. Defences: bona fide purchase and payment for consideration.**

The defence of bona fide purchaser for value is well established in relation to proprietary claims<sup>1</sup> and claims to set aside or rectify transactions<sup>2</sup>. However, it now appears to have a counterpart in relation to personal restitutionary claims for money paid under mistake. Thus payment for good consideration is a defence<sup>3</sup>. This is not merely an aspect of the defence of change of position<sup>4</sup>, and its relationship with the view that mistaken payments are recoverable for failure (or absence) of consideration<sup>5</sup> is obvious.

It is not essential that the payee gives consideration to the payer. Thus a payment which discharges a debt owed to the payee (or a principal on whose behalf he is authorised to receive payment) by the payer or by a third party by whom he is authorised to discharge the debt will not be recoverable<sup>6</sup>, even if the payee is thereby unjustly enriched<sup>7</sup>. In such cases it will be necessary to determine whether the debt concerned is in fact discharged<sup>8</sup>.

1 *Pilcher v Rawlins* (1872) 7 Ch App 259, CA; *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1995] 3 All ER 747, [1995] 1 WLR 978 (on appeal [1996] 1 All ER 585, [1996] 1 WLR 387, CA).

2 See PARA 42.

3 *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J; *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, [1992] 4 All ER 512, HL; and see **RESTITUTION** vol 40(1) (2007 Reissue) PARA 171.

4 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 at 580-581, [1992] 4 All ER 512 at 534-535, HL, per Lord Goff of Chieveley. As to change of position see PARA 75.

5 See PARA 70.

6 *Barclays Bank Ltd v WJ Simms, Son & Cooke (Southern) Ltd* [1980] QB 677 at 695, [1979] 3 All ER 522 at 535 per Robert Goff J; *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

7 *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA.

8 *Lloyd's Bank plc v Independent Insurance Co Ltd* [2000] QB 110, [1999] 1 All ER (Comm) 8, CA; and see *Owen v Tate* [1976] QB 402, [1975] 2 All ER 129, CA.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(5) RECOVERY OF MONEY PAID UNDER A MISTAKE/(ii) In Equity/77. Recovery and regularisation in equity.

## (ii) In Equity

### 77. Recovery and regularisation in equity.

In principle, wherever the common law would allow recovery of a mistaken payment, so too would equity<sup>1</sup>. In some respects, however, equity went further. First, it appears that, at least in the exclusive jurisdiction dealing with trusts and estates, equity would give relief in cases of mistake of law<sup>2</sup>, although in the case of a claim to recover monies paid out of a deceased's estate in error, the real beneficiary must first exhaust his claim against the personal representative before claiming against the recipient of the payment<sup>3</sup>. Secondly, it may be that a payment made under mistake does not pass property in equity, so grounding an equitable proprietary claim<sup>4</sup>. Thirdly, a trustee who has overpaid a beneficiary, or paid the wrong beneficiary, can recoup the payment (or overpayment) out of any trust capital or income remaining in or coming into his hands to which the beneficiary<sup>5</sup> (or his assignee<sup>6</sup>) would be entitled<sup>7</sup>. This is an aspect of equitable accounting between trustee and beneficiary<sup>8</sup>, and is unaffected by the limitation legislation<sup>9</sup>. In some cases equity will direct settled accounts to be reopened because of mistake<sup>10</sup>.

In one respect however, equity is narrower than the common law. In relation to mistaken payments from trusts (but not from estates<sup>11</sup> or, probably, company liquidators<sup>12</sup>) equity will ordinarily require the recipient to repay monies wrongfully distributed to him (as opposed to setting off against other entitlement of the payee) only if there is some degree of fault on his part<sup>13</sup>. However, the authorities hitherto have variously made liability depend on the recipient's: (1) failing to make the inquiries which an honest and reasonable person would make<sup>14</sup>; (2) knowledge of circumstances that would indicate the facts to a reasonable person<sup>15</sup>; or (3) knowledge of circumstances that would put a reasonable person on inquiry<sup>16</sup>. The position at the date at which this volume states the law seems to make liability depend on a reasonable person's state of knowledge being such as to make it unconscionable for him to retain the benefit of the payment<sup>17</sup>.

1 See eg *Sybron Corp v Rochem Ltd* [1984] Ch 112, [1983] 2 All ER 707, CA. As to recovery at common law see PARA 69 et seq.

- 2 *Re Musgrave, Machell v Parry* [1916] 2 Ch 417; *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL; *Gibbon v Mitchell* [1990] 3 All ER 338, [1990] 1 WLR 1304; and see **TRUSTS** vol 48 (2007 Reissue) PARA 1133.
- 3 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.
- 4 See PARAS 26-27.
- 5 *Downes v Bullock* (1858) 25 Beav 54; *Re Musgrave, Machell v Parry* [1916] 2 Ch 417; *IVS Enterprises Ltd v Chelsea Cloisters Management Ltd* [1994] EGCS 14, 13 TLI 111; cf, however, *Re Horne, Wilson v Cox Sinclair* [1905] 1 Ch 76 at 80-81 per Warrington J (trustee also beneficiary).
- 6 *Re Moore, Moore v Moore* (1881) 45 LT 466.
- 7 See **TRUSTS** vol 48 (2007 Reissue) PARA 1133.
- 8 *Harris v Harris (No 2)* (1861) 29 Beav 110; *Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502.
- 9 *Re Robinson, McLaren v Public Trustee* [1911] 1 Ch 502.
- 10 See PARA 78.
- 11 *Ministry of Health v Simpson* [1951] AC 251, [1950] 2 All ER 1137, HL.
- 12 *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401.
- 13 *Bate v Hooper* (1855) 5 De GM & G 338; *Downes v Bullock* (1858) 25 Beav 54; *Hilliard v Fulford* (1876) 4 ChD 389; but see Nicholls 'Knowing Receipt: The Need for a New Landmark' in Cornish (ed) *Restitution, Past, Present and Future* (1998).
- 14 *Re Montagu's Settlement Trusts, Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264 at 285, [1987] 2 WLR 1192 at 1211 per Megarry V-C; *Jonathan v Tilley* (1995) 12 Trust Law International 36 at 39-42; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862 at 900-903 per Knox J; *Bristol and West Building Society v Mothew* [1998] Ch 1 at 23, [1996] 4 All ER 698 at 716, CA, per Millett LJ.
- 15 *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 410, 412, CA, per Goff LJ; *Agip (Africa) Ltd v Jackson* [1990] Ch 265 at 292-293, [1992] 4 All ER 385 at 404-405 per Millett J (affd [1991] Ch 547, [1992] 4 All ER 451, CA).
- 16 *Citadel General Assurance Co Ltd v Lloyd's Bank Canada* (1997) 152 DLR (4th) 411.
- 17 *Bank of Credit and Commerce International (Overseas) Ltd (in liquidation) v Akindele* [2001] Ch 437 at 455, [2000] 4 All ER 221 at 235-236, CA, per Nourse LJ; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446, [2004] QB 985, [2004] 1 All ER (Comm) 193, at [148] per Clarke J; *Nabb Brothers Ltd v Lloyds Bank International (Guernsey) Ltd* [2005] EWHC 405 (Ch) at [71], [2005] All ER (D) 322 (Mar) at [71] per Lawrence Collins J.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(6) REOPENING OF ACCOUNTS/78. Reopening of accounts.

## **(6) REOPENING OF ACCOUNTS**

### **78. Reopening of accounts.**

The court may reopen an account or give liberty to surcharge and falsify<sup>1</sup> where it was drawn up under a mistake<sup>2</sup>. It is not necessary that money should have been actually paid, and the same rules also apply where the money has only been allowed in account<sup>3</sup>. The giving of a negotiable instrument is for this purpose equivalent to the payment of money<sup>4</sup>.

Where accounts between two parties are shown to be erroneous to a considerable extent both in amount and in the number of items, or where there is a fiduciary relationship and a less considerable number of errors are shown, or where the fiduciary relationship exists and one or

more fraudulent omissions or insertions in the accounts are shown, the court will reopen the account, and not merely surcharge and falsify<sup>5</sup>. It may also do so even if there is only a single error<sup>6</sup>. However, where there has been a long lapse of time and loss of books and documents, the court may decline to reopen the accounts altogether and give liberty to surcharge and falsify only, notwithstanding that numerous and important errors in the account are proved<sup>7</sup>.

It is also now provided that any party who wishes to contend that an accounting party has or should be treated as having received more than the accounts show that he has received, or that the accounts are otherwise inaccurate, may give written notice of such objections to the accounting party<sup>8</sup>.

1 As to the procedure for accounts and inquiries generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 1524 et seq.

2 *Coleman v Mellersh* (1850) 2 Mac & G 309 at 314-315; *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 83-84, CA, per Davey LJ.

3 *Skyring v Greenwood* (1825) 4 B & C 281; *Lucas v Jones* (1844) 5 QB 949 at 953; *Standish v Ross* (1849) 3 Exch 527 at 534 per Parke B; *Gingell v Purkins* (1850) 4 Exch 720 at 726 per Parke B; *Ehrensperger v Anderson* (1848) 3 Exch 148; *Ward & Co v Wallis* [1900] 1 QB 675.

4 *Coward v Hughes* (1855) 1 K & J 443.

5 *Williamson v Barbour* (1877) 9 ChD 529 at 533 per Jessel MR; and see *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 83-84, CA, per Davey LJ; *Cheese v Keen* [1908] 1 Ch 245 at 251 per Neville J.

6 *Taylor v Haylin* (1788) 2 Bro CC 310; *Pritt v Clay* (1843) 6 Beav 503; and see *Gething v Keighley* (1878) 9 ChD 547 at 550 per Jessel MR; *Re Webb, Lambert v Still* [1894] 1 Ch 73 at 82, 85, CA, per Davey LJ.

7 *Millar v Craig* (1843) 6 Beav 433; *Brownell v Brownell* (1786) 2 Bro CC 62 at 63; *Re Webb, Lambert v Still* [1894] 1 Ch 73, CA. Cf *Allfrey v Allfrey* (1849) 1 Mac & G 87 at 93-94 per Lord Cottenham LC. As to the reopening of settled accounts see **EQUITY** vol 16(2) (Reissue) PARA 453.

8 See *Practice Direction--Accounts, Inquiries etc* PD40 paras 3.1-3.3; and **CIVIL PROCEDURE** vol 11 (2009) PARA 1526. As to the overlap between this process and the common law grant of liberty to surcharge and falsify see **EQUITY** vol 16(2) (Reissue) PARA 454.

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## **(7) RECOVERY OF PROPERTY TRANSFERRED UNDER A MISTAKE**

### **79. At common law.**

Where mistake has prevented property from passing at law<sup>1</sup>, the transferor remains legal owner, and has all the normal remedies for recovery of possession of the property concerned, whether realty<sup>2</sup> or personalty<sup>3</sup>. The transferor may normally follow his property into the hands of a third party<sup>4</sup>, though in the case of money and negotiable instruments not against a purchaser for value<sup>5</sup>, and also subject to the effect of transactions abroad<sup>6</sup>. Difficulties, however, may arise where the property becomes affixed to or mixed with property belonging to other persons<sup>7</sup>.

1 See PARAS 26-27.

2 See **REAL PROPERTY** vol 39(2) (Reissue) PARAS 259-300.

3 See **TORT** vol 45(2) (Reissue) PARAS 612-614.

4 *Reid v Metropolitan Police Comr* [1973] QB 551, [1973] 2 All ER 97, CA. Sale by market overt, in which tracing property into the hands of a third party was not possible, was abolished by the Sale of Goods (Amendment) Act 1994: see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1026; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 5.

5 *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 381 per Blackburn J; *Moss v Hancock* [1899] 2 QB 111; *Banque Belge pour l'Etranger v Hambrouck* [1921] 1 KB 321 at 329, CA, per Scrutton LJ.

6 *Winkworth v Christie Manson and Woods Ltd* [1980] Ch 496, [1980] 1 All ER 1121.

7 See PARA 26.

Halsbury's Laws of England/MISTAKE (VOLUME 77 (2010) 5TH EDITION)/3. REMEDIES/(7) RECOVERY OF PROPERTY TRANSFERRED UNDER A MISTAKE/80. In equity.

## 80. In equity.

Where property has passed at law, but mistake has prevented it from passing in equity<sup>1</sup>, or rescission has revested full equitable ownership in the transferor<sup>2</sup>, the transferor as equitable owner may demand that the transferee recover the legal ownership to him or as he may direct<sup>3</sup>. The transferee is not, however, to be regarded as a trustee for the transferor until he has such notice of the true facts as would affect his conscience<sup>4</sup>. The transferor may trace his property into changes of form and into the hands of third parties, until it reaches the hands of a bona fide purchaser for value of a legal interest without notice<sup>5</sup>.

1 See PARAS 26-27.

2 See PARA 55.

3 See *Wood v Rowcliffe* (1847) 2 Ph 382.

4 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705-706, [1996] 2 All ER 961 at 988, HL, per Lord Browne-Wilkinson.

5 See **EQUITY** vol 16(2) (Reissue) PARAS 861-866.